DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-872
Title: Lisa Madigan, et al., Petitioners
v.
Harvey N. Levin
Docketed: January 16, 2013
Linked with 12A455
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (11-2620)
Decision Date: August 17, 2012
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 5 2012	Application (12A455) to extend the time to file a petition for a writ of certiorari from November 15, 2012 to January 14, 2013, submitted to Justice Kagan.
Nov 6 2012	Application (12A455) granted by Justice Kagan extending the time to file until January 14, 2013.
Jan 14 2013	Petition for a writ of certiorari filed. (Response due February 15, 2013)
Feb 15 2013	Brief of respondent Harvey N. Levin in opposition filed.
Feb 15 2013	Brief amicus curiae of International Municipal Lawyers Association filed.
Feb 15 2013	Brief amici curiae of Michigan and Eleven Other States filed.
Feb 27 2013	DISTRIBUTED for Conference of March 15, 2013.
Feb 27 2013	Reply of petitioners Lisa Madigan, et al. filed. (Distributed)
Mar 18 2013	Petition GRANTED.
Apr 9 2013	Consent to the filing of amicus curiae briefs, in support of eitiher party or of neither party, received from counsel for the respondent.
Apr 19 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including June 3, 2013.
Apr 19 2013	The time to file respondent's brief on the merits is extended to and including August 2, 2013.
May 29 2013	Motion to dispense with printing the joint appendix filed by petitioner Lisa Madigan, et al.
Jun 3 2013	Brief of petitioners Lisa Madigan, et al. filed.
Jun 6 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jun 10 2013	Brief amici curiae of National School Boards Association, et al. filed.
Jun 10 2013	Brief amici curiae of Michigan and Twenty Other States filed.
Jun 10 2013	Brief amici curiae of International Municipal Lawyers Association, et al. filed.

Jun 24 2013	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jul 22 2013	CIRCULATED.
Jul 23 2013	SET FOR ARGUMENT on Monday, October 7, 2013.
Aug 2 2013	Brief of respondent Harvey N. Levin filed. (Distributed)
Aug 5 2013	Brief amici curiae of Law Professors filed. (Distributed)
Aug 9 2013	Brief amici curiae of American Federation of Labor and Congress of Industrial Organizations, et al. filed. (Distributed)
Aug 9 2013	Record from U.S.C.A. for 7th Circuit is electronic.
Aug 9 2013	Brief amici curiae of AARP and National Senior Citizens Law Center filed. (Distributed)
Aug 9 2013	Brief amicus curiae of National Education Association filed.
Sep 3 2013	Reply of petitioners Lisa Madigan, et al. filed. (Distributed)
Oct 7 2013	Argued. For petitioners: Michael Scodro, Illinois Solicitor General, Chicago, Ill. For respondent: Edward R. Theobald, III, Chicago, Ill.
Oct 15 2013	Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.
Nov 18 2013	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12-872

FILED
JAN 14 2013
OFFICE OF THE CLERK

No. 12-

In the Supreme Court of the United States

LISA MADIGAN, in her individual capacity, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,
PETITIONERS,

v.

HARVEY LEVIN,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

Attorneys for Petitioners

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES. iv

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED. 1

STATEMENT. 2

REASONS FOR GRANTING THE PETITION. 7

I. Courts Are Intractably Divided Over Whether The ADEA Precludes A § 1983 Equal Protection Claim for Age Discrimination In Employment. . 7

II. The Question Presented Is Important, And This Case Is An Ideal Vehicle For Resolving The Deepening Split Among Lower Federal Courts. 12

III. The Seventh Circuit's Rule Follows From A Misreading Of This Court's Precedent. 17

CONCLUSION. 23

TABLE OF CONTENTS—Continued

APPENDICES. 1a

A. *Levin v. Madigan*,
692 F.3d 607 (7th Cir. 2012). 1a

B. *Levin v. Madigan*,
No. 07 C 4765 (N.D. Ill. July 21, 2011)
(Memorandum Opinion and Order). 37a

C. *Levin v. Madigan*,
No. 07 C 4765 (N.D. Ill. Mar. 10, 2010)
(Memorandum Opinion and Order). 103a

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adair v. eStem Pub. Charter Schs.,
No. 4:11-cv-541-DPM, 2012 WL 474019
(E.D. Ark. Feb. 14, 2012).. 11

Ahlmeyer v. Nev. Sys. of Higher Educ.,
555 F.3d 1051 (9th Cir. 2009). 3, 4, 8, 16

Alba v. Housing Auth. of City of Pittston,
400 F. Supp. 2d 685 (M.D. Pa. 2005). 11

Arnett v. Kennedy, 416 U.S. 134 (1974). 20

Barlieb v. Kutztown Univ.,
No. Civ. A 03-4126, 2003 WL 22858575
(E.D. Pa. Dec. 1, 2003).. 11

Blessing v. Freestone, 520 U.S. 329 (1997). 17

Britt v. Grocers Supply Co., Inc.,
978 F.2d 1441 (5th Cir. 1992). 15

Cataldo v. Moses,
No. Civ. A. 02-2588 (FSH), 2005 WL 705339
(D.N.J. Mar. 29, 2005).. 11

Chennareddy v. Brown,
935 F.2d 315 (D.C. Cir. 1991). 5, 8

TABLE OF AUTHORITIES—Continued

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005). 5, 17

Donlon v. Bd. of Educ. of the Greece Cent. Sch. Dist., No. 06-CV-6027T, 2007 WL 4553932
(W.D.N.Y. Dec. 20, 2007).. 9

Dudley v. Lake Ozark Fire Prot. Dist.,
No. 09-4086-cv-c-NKL, 2010 WL 1992188
(W.D. Mo. May 17, 2010).. 11

Edwards v. Armstrong,
593 F.3d 170, 1995 WL 390279
(6th Cir. June 30, 1995). 12

EEOC v. Reno, 758 F.2d 581 (11th Cir. 1985). 21

Farmer v. Camden City Bd. of Educ.,
Civil No. 03-685 (JBS), 2005 WL 984376
(D.N.J. Mar. 28, 2005).. 11

Ficklin v. Bibb Cnty. Sch. Dist.,
Civil Action No. 5:09-CV-191 (MTT), 2011
WL 672327 (M.D. Ga. Feb. 17, 2011). 10

Fitzgerald v. Barnstable Sch. Comm.,
555 U.S. 246 (2009). 5-6, 19, 20

Ford v. Oakwood,
905 F. Supp. 1063 (N.D. Ga. 1995).. 10

TABLE OF AUTHORITIES—Continued

Frye v. Grandy, 625 F. Supp. 1573 (D. Md. 1986). . 15

Gregor v. Derwinski,
911 F. Supp. 643 (W.D.N.Y. 1996). 10

Hamilton v. City of Springdale,
Civil No. 10-5061, 2011 WL 2560258
(W.D. Ark. June 29, 2011).. 11

Hobbs v. Hawkins, 968 F.2d 471 (5th Cir. 1992). . . 12

Hornfeld v. N. Miami Beach,
29 F. Supp. 2d 1357 (S.D. Fla. 1998),
rev'd in part, vacated in part,
208 F.3d 1010 (11th Cir. (2000). 10

Humphrey v. Neb. Pub. Power Dist.,
503 N.W.2d 211 (Neb. 1993).. 11

Jungels v. State Univ. College of N.Y.,
922 F. Supp. 779 (W.D.N.Y. 1996),
aff'd *sub nom. Jungels v. Jones*,
112 F.3d 504 (2d Cir. 1997).. 9

Kelley v. White,
No. 5:10CV00288 JMM, 2011 WL 4344180
(E.D. Ark. Sept. 15, 2011). 11

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000). 8

TABLE OF AUTHORITIES—Continued

Lafleur v. Tex. Dep't of Health,
126 F.3d 758 (5th Cir. 1997)..... 4, 5, 8

Lorillard v. Pons, 434 U.S. 575 (1978)..... 13

McCroan v. Bailey,
543 F. Supp. 1201 (S.D. Ga. 1982)..... 15

McLaurin v. Fischer, 768 F.2d 98 (6th Cir. 1985).. 12

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)... 3, 5, 17, 18

Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998), vacated on other grounds *sub nom. Bd. of Regents of Univ. of N.M. v. Migneault*,
528 U.S. 1110 (2000)..... 3-4, 5, 8

Monce v. San Diego, 895 F.2d 560 (9th Cir. 1990).. 21

Mummelthie v. City of Mason,
873 F. Supp. 1293 (N.D. Iowa 1995), aff'd
78 F.3d 589 (8th Cir. 1996)..... 10

Mustafa v. Neb. Dep't of Corr. Servs.,
196 F. Supp. 2d 945 (D. Neb. 2002)..... 10, 11

Paterson v. Weinberger,
644 F.2d 521 (5th Cir. 1981)..... 21

TABLE OF AUTHORITIES—Continued

Phillis v. Harrisburg Sch. Dist.,
Civil Action No. 1:07-cv-1728,
2010 WL 1390663
(M.D. Pa. Mar. 31, 2010). 11, 15

Preiser v. Rodriguez, 411 U.S. 475 (1973). 5, 18

Ray v. City of Opa-Locka,
No. 12-CV-21769, 2012 WL 4896162
(S.D. Fla. Oct. 15, 2012). 10

Reed v. Town of Branford,
949 F. Supp. 87 (D. Conn. 1996). 9

Rehberg v. Paulk, 132 S. Ct. 1497 (2012). 21

Ring v. Crisp Cnty. Hosp. Auth.,
652 F. Supp. 477 (M.D. Ga. 1987). 10, 15

Sampson v. Murray, 415 U.S. 61 (1974). 20

Shapiro v. N.Y. City Dep't of Educ.,
561 F. Supp. 2d 413 (S.D.N.Y. 2008). 9

Smith v. Robinson, 468 U.S. 992 (1984),
superceded by statute, PL 99-372,
100 Stat. 796 (1986). 5, 17, 18, 19

Smith v. Wade, 461 U.S. 30 (1983). 15

TABLE OF AUTHORITIES—Continued

Stampfel v. City of N.Y.,
No. 04 Civ. 5036, 2005 WL 3543696
(S.D.N.Y. Dec. 27, 2005). 9

Tapia-Tapia v. Potter,
322 F.3d 742 (1st Cir. 2003). 4-5, 8

Tranello v. Frey, 758 F. Supp. 841 (W.D.N.Y. 1991),
aff'd on other grounds, 962 F.2d 244
(2d Cir. 1992). 10

Zombro v. Baltimore City Police Dep't,
868 F.2d 1364 (4th Cir. 1989). 4, 8, 15

Constitutional Provision:

U.S. Const. amend. XIV, § 1.. 2

Statutes:

28 U.S.C. § 1254(1).. 1

29 U.S.C. § 211(b).. 14

29 U.S.C. § 216. 14

29 U.S.C. § 216(b).. 16

29 U.S.C. § 217. 14

29 U.S.C. § 621 *et seq*... 3

TABLE OF AUTHORITIES—Continued

29 U.S.C. § 626(b) 14, 16

29 U.S.C. § 626(c)(1) 14

29 U.S.C. § 626(d)(1)(A) 13

29 U.S.C. § 626(d)(2) 13

29 U.S.C. § 630(f) 21

42 U.S.C. § 1983 . . . . . 2, 3

Other:

David C. Miller, *Alone in its Field: Judicial Trend to Hold that the ADEA Preempts § 1983 in Age Discrimination in Employment Claims*, 29 Stetson L. Rev. 573 (2000) 14

http://www.census.gov/compendia/statab/ 2012/ tables/12s0461.pdf 16

http://www.census.gov/govs/apes 13

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lisa Madigan, Illinois Attorney General in her individual capacity, Ann Spillane, Alan Rosen, Roger P. Flahaven, and Deborah Hagan, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, affirmed the judgment of the district court denying petitioners qualified immunity from respondent's equal protection claim brought pursuant to 42 U.S.C. § 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial of qualified immunity (App. 1a-37a) is reported at 692 F.3d 607. The memorandum opinion of the United States District Court for the Northern District of Illinois denying qualified immunity (App. 38a-102a) is not reported.

JURISDICTION

The court of appeals entered judgment on August 17, 2012. App. 1a. On November 6, 2012, Justice Kagan extended until January 14, 2013 the time within which to file a certiorari petition. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In relevant part, the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983.

STATEMENT

1. Respondent Harvey Levin was employed as an Assistant Illinois Attorney General from September 5, 2000, until his termination, with 11 other attorneys, on May 12, 2006. App. 2a-3a. He was 55 years old at the time he was hired in 2000. App. 3a. Respondent claimed that he was replaced by a female attorney in her thirties. *Ibid.*

2. Respondent filed an amended complaint alleging both age and sex discrimination. Doc. 16. As relevant to this appeal, he claimed that he was fired because of

his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and, via 42 U.S.C. § 1983, that his termination also violated the Equal Protection Clause of the Fourteenth Amendment. Doc. 16 at 1-9, 21-23. Petitioners claimed, in response, that respondent's "low productivity, excessive socializing, inferior litigation skills, and poor judgment led to his termination." App. 3a.

3. Petitioners moved, *inter alia*, to dismiss the equal protection count on the ground that the ADEA displaced any competing, constitutional claim for age discrimination under § 1983. Doc. 36 at 2. In the alternative, petitioners argued that qualified immunity shielded them from respondent's § 1983 claim for damages. *Ibid.*

4. The district court recognized the series of decisions from this Court, see, *e.g.*, *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), holding that a federal statute may implicitly foreclose § 1983 as an alternative remedy for the same class of injury that the statute redresses. App. 125a-126a. And the court acknowledged that whether *Sea Clammers* and its progeny apply to foreclose § 1983 claims in this context is a question over which federal courts are currently split. App. 122a-125a. Specifically, although "[s]everal courts of appeals have held that the ADEA provides the exclusive remedy for age discrimination claims and therefore precludes age discrimination suits brought under § 1983," App. 122a-123a (citing *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998), vacated on other grounds *sub*

nom. Bd. of Regents of Univ. of N.M. v. Migneault, 528 U.S. 1110 (2000); *Lafleur v. Tex. Dep't of Health*, 126 F.3d 758 (5th Cir. 1997) (*per curiam*); and *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989)), district courts remain "deeply divided" over the question, App. 123a. Ultimately, the district court here rejected the unanimous weight of federal appellate authority and sided with certain district courts to hold that the ADEA does not foreclose § 1983 equal protection claims for alleged age discrimination. App. 124a-125a. In light of the nationwide uncertainty on this issue, however, the court awarded petitioners qualified immunity on respondent's § 1983 claim. App. 133a.

Later, in response to petitioners' motion for summary judgment, the district court reiterated its holding that the ADEA does not displace § 1983 age discrimination claims. App. 57a. The court went on, however, to reverse its earlier determination that petitioners were entitled to qualified immunity based on the legal uncertainty over whether such displacement is proper. App. 70a-73a.

5. Petitioners appealed from the denial of qualified immunity, and the Seventh Circuit affirmed the holding that the ADEA does not displace § 1983 age discrimination claims. The court acknowledged that the displacement issue was one of first impression in that circuit, but that "[a]ll other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims, largely relying on the Fourth Circuit's reasoning in *Zombro*[.]" App. 20a (citing *Ahlmeyer*, 555 F.3d 1051; *Tapia-Tapia v. Potter*,

322 F.3d 742 (1st Cir. 2003); *Migneault*, 158 F.3d 1131; *Lafleur*, 126 F.3d 758; and *Chennareddy v. Brown*, 935 F.2d 315 (D.C. Cir. 1991)). But district courts in other circuits are split, the court observed, App. 20a, and "[g]iven the conflicting case law, further review of the issue is required," App. 23a.

The court explained that the question is "admittedly a close call, especially in light of the conflicting decisions from our sister circuits." App. 23a. But, in a "decision [that] creates a conflict among the circuits," the court held that the ADEA does not "preclude a § 1983 claim for constitutional rights." App. 23a & n.2. The Seventh Circuit recognized that, in *Sea Clammers* and another decision, *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), this Court held that comprehensive remedial regimes in federal statutes—environmental laws in *Sea Clammers* and the Telecommunications Act in *Rancho Palos Verdes*—displaced a § 1983 remedy for violating those same statutes. App. 9a-10a. And the Seventh Circuit acknowledged that "the ADEA enacts a comprehensive statutory regime for enforcement of its own statutory rights, akin to *Sea Clammers* and *Rancho Palos Verdes*." App. 23a. Furthermore, the court observed, this Court has also displaced § 1983 claims of plaintiffs, like respondent, who seek to bypass a specific statutory remedy by raising a *constitutional* claim under § 1983. App. 10a-13a (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Smith v. Robinson*, 468 U.S. 992 (1984), superceded by statute, PL 99-372, 100 Stat. 796 (1986)).

But the Seventh Circuit interpreted *Smith*, *Preiser*, and a third decision, *Fitzgerald v. Barnstable School*

Committee, 555 U.S. 246 (2009), to require something more than the established, *Sea Clammers* inquiry into the scope of a law's remedial regime when determining whether that law displaces a § 1983 remedy for the violation of a constitutional (rather than a statutory) right. App. 17a, 26a-28a. Those decisions, the Seventh Circuit reasoned, direct courts to look for express statements of congressional intent in the statute's text and legislative history, and to compare the statute's protections to those available under the Constitution via § 1983. App. 26a-28a, 32a. Here, because the Seventh Circuit determined that the ADEA lacks "legislative history or statutory language precluding constitutional claims," and that there are differences between the "rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim," the court resolved what it conceded was a "close call" in favor of preserving respondent's constitutional age discrimination claim. App. 23a.

REASONS FOR GRANTING THE PETITION

This petition raises an important and frequently recurring question over which the lower federal courts are hopelessly divided—whether the ADEA displaces § 1983 equal protection claims for alleged age discrimination by state and local government employers. In its decision below, the Seventh Circuit acknowledged that its holding that the ADEA does not foreclose these § 1983 claims created a split with the rule in several other circuits, and that district courts in the remaining circuits are themselves deeply divided. This Court's intervention is needed to reconcile this growing, nationwide split in authority. The question is of exceptional importance to state and local government employers, and the Seventh Circuit's decision not only adds to the conflict among lower federal courts, but it reaches the wrong result by misreading this Court's case law.

I. Courts Are Intractably Divided Over Whether The ADEA Precludes A § 1983 Equal Protection Claim For Age Discrimination In Employment.

As the Seventh Circuit acknowledged, its holding that the ADEA does not preclude a § 1983 equal protection claim for age discrimination in employment "creates a conflict among the circuits." App. 23a n.2. The decision below further recognized that district courts in circuits where the question is unresolved are also "split on the issue." App. at 20a. This well-developed and deepening division of lower court authority calls for certiorari review.

Four circuits—the Fourth, Fifth, Ninth, and Tenth—have held that the ADEA precludes § 1983 equal protection claims by state and local government employees for age discrimination in employment, precisely the rule the Seventh Circuit rejected here. See *Zombro*, 868 F.2d at 1369 ("The conclusion is irresistible that the ADEA provides the exclusive judicial remedy for claims of age discrimination."); *Lafleur*, 126 F.3d at 760 ("we agree" "that an age discrimination claim brought under § 1983 is preempted by the ADEA") (internal quotation marks omitted); *Ahlmeyer*, 555 F.3d at 1057 ("the ADEA precludes the assertion of age discrimination in employment claims, even those seeking to vindicate constitutional rights, under § 1983"); *Migneault*, 158 F.3d at 1140 ("the law of this circuit" is "that age discrimination claims brought under § 1983 are preempted by the ADEA"), abrogated on other grounds by *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (all cited by Seventh Circuit at App. 20a).

And two more federal courts of appeals—the First and District of Columbia Circuits—have held that the ADEA preempts age discrimination claims by *federal* employees, and have suggested that the same rule may apply to their state and local counterparts. See *Tapia-Tapia*, 322 F.3d at 745 (citing *Lafleur* and *Zombro* with favor in holding that ADEA precludes constitutional claims by federal employees); *Chennareddy*, 935 F.2d at 318 (citing *Zombro* with favor for rule "that the ADEA provides the exclusive remedy for a federal employee who claims age discrimination") (both cited by Seventh Circuit at App. 20a). Thus, as

the Seventh Circuit acknowledged, given "the conflicting decisions from [its] sister circuits," App. 23a, the decision below subjects state and local governments within Illinois, Indiana, and Wisconsin to a different rule than government employers face in the Fourth, Fifth, Ninth, and Tenth Circuits (and likely the First and District of Columbia Circuits as well).

Meanwhile, as the Seventh Circuit further recognized, district courts in circuits that have yet to address this question are also deeply "split on the issue." App. 20a. Federal courts in the Second, Third, Sixth, Eighth, and Eleventh Circuits—even courts within the same State—have reached contrary holdings on the issue of ADEA exclusivity. Thus, in the Second Circuit, which has not ruled on whether the ADEA is the exclusive remedy for age-based employment discrimination claims, district courts are openly "divided" on that question. *Donlon v. Bd. of Educ. of the Greece Cent. Sch. Dist.*, No. 06-CV-6027T, 2007 WL 4553932, at *2 (W.D.N.Y. Dec. 20, 2007); *accord Reed v. Town of Branford*, 949 F. Supp. 87, 89 (D. Conn. 1996). District courts within the State of New York alone—where the issue arises regularly—have reached inconsistent holdings. Compare, *e.g.*, *Shapiro v. N.Y. City Dep't of Educ.*, 561 F. Supp. 2d 413, 420 (S.D.N.Y. 2008) (ADEA is not exclusive remedy), *Stampfel v. City of N.Y.*, No. 04 Civ. 5036, 2005 WL 3543696, at *3 (S.D.N.Y. Dec. 27, 2005) (same), *Donlon*, 2007 WL 4553932, at *3 (same), and *Jungels v. State Univ. College of N.Y.*, 922 F. Supp. 779, 785 (W.D.N.Y. 1996) (same), aff'd *sub nom. Jungels v. Jones*, 112 F.3d 504 (2d Cir. 1997) (unpublished table decision), with, *e.g.*,

Gregor v. Derwinski, 911 F. Supp. 643, 651 (W.D.N.Y. 1996) (ADEA is exclusive remedy), and *Tranello v. Frey*, 758 F. Supp. 841, 850-851 n.3 (W.D.N.Y. 1991) (same), aff'd on other grounds, 962 F.2d 244 (2d Cir. 1992).

And even if the Seventh Circuit is correct that the "weight of authority" among district courts in the Second Circuit favors no preclusion of § 1983 age discrimination claims, App. 20a, the opposite is true of the Eleventh Circuit. Georgia district courts have universally held that the ADEA precludes § 1983 claims based on age discrimination. See *Ficklin v. Bibb Cnty. Sch. Dist.*, Civil Action No. 5:09-CV-191 (MTT), 2011 WL 672327, at *8 (M.D. Ga. Feb. 17, 2011); *Ford v. Oakwood*, 905 F. Supp. 1063, 1066 (N.D. Ga. 1995); *Ring v. Crisp Cnty. Hosp. Auth.*, 652 F. Supp. 477, 482 (M.D. Ga. 1987). At the same time, district courts in Florida have reached conflicting holdings on the issue, leaving that State's public employers and employees (like New York's) with conflicting guidance. Compare *Ray v. City of Opa-Locka*, No. 12-CV-21769, 2012 WL 4896162, at *3 (S.D. Fla. Oct. 15, 2012) (ADEA is exclusive remedy), with *Hornfeld v. N. Miami Beach*, 29 F. Supp. 2d 1357, 1369 (S.D. Fla. 1998) (ADEA is not exclusive remedy), rev'd in part, vacated in part, 208 F. 3d 1010 (11th Cir. 2000) (unpublished table decision).

District courts in the Eighth Circuit are also split. Some hold that the ADEA does not preclude § 1983 age discrimination claims. See *Mummelthie v. City of Mason*, 873 F. Supp. 1293, 1323 (N.D. Iowa 1995), aff'd, 78 F.3d 589 (8th Cir. 1996) (unpublished table decision); *Mustafa v. Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 955-956 & n.1 (D. Neb. 2002) (following

Mummelthie). Others, meanwhile, have adopted the contrary rule. See *Adair v. eStem Pub. Charter Schs.*, No. 4:11-cv-541-DPM, 2012 WL 474019, at *2 (E.D. Ark. Feb. 14, 2012); *Kelley v. White*, No. 5:10CV00288 JMM, 2011 WL 4344180, at *3 (E.D. Ark. Sept. 15, 2011); *Hamilton v. City of Springdale*, Civil No. 10-5061, 2011 WL 2560258, at *13 (W.D. Ark. June 29, 2011); *Dudley v. Lake Ozark Fire Prot. Dist.*, No. 09-4086-cv-c-NKL, 2010 WL 1992188, at *8 (W.D. Mo. May 17, 2010). And in the State of Nebraska, a district court held that the ADEA does not preclude § 1983 claims based on age discrimination, see *Mustafa*, 196 F. Supp. 2d at 955-956 & n.11, while the Nebraska Supreme Court reached the opposite conclusion, see *Humphrey v. Neb. Pub. Power Dist.*, 503 N.W.2d 211, 216 (Neb. 1993).

Case law in the Third Circuit is just as muddled. Many lower courts there have held that the ADEA is the exclusive remedy for age discrimination in employment claims. See, *e.g.*, *Phillis v. Harrisburg Sch. Dist.*, Civil Action No. 1:07-cv-1728, 2010 WL 1390663, at *10 (M.D. Pa. Mar. 31, 2010); *Cataldo v. Moses*, No. Civ. A. 02-2588 (FSH), 2005 WL 705339, at *17 (D.N.J. Mar. 29, 2005); *Farmer v. Camden City Bd. of Educ.*, Civil No. 03-685 (JBS), 2005 WL 984376, at *9 (D.N.J. Mar. 28, 2005); *Barlieb v. Kutztown Univ.*, No. Civ. A 03-4126, 2003 WL 22858575, at *4 (E.D. Pa. Dec. 1, 2003). But at least one Pennsylvania district court has suggested otherwise. See *Alba v. Housing Auth. of City of Pittston*, 400 F. Supp. 2d 685, 706 (M.D. Pa. 2005) (indicating that employee may be able to "assert a constitutional claim for age discrimination independent

of his ADEA claim," although instant plaintiff did not do so).

Finally, case law in the Sixth Circuit is also conflicted. In one unreported decision, that court noted, in dicta but approvingly, that the Fourth and Fifth Circuits have held "that the ADEA's exclusivity prevents § 1983 liability." *Edwards v. Armstrong*, 593 F.3d 170 (unpublished table decision), 1995 WL 390279, at *4 (6th Cir. June 30, 1995) (citing *Zombro* and *Hobbs v. Hawkins*, 968 F.2d 471 (5th Cir. 1992)). In an earlier decision, however, the Sixth Circuit considered a due process claim premised on age discrimination in employment pursuant to § 1983, and the court assumed without deciding that the ADEA is not the exclusive remedy for such claims. See *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985).

In short, the question whether the ADEA precludes § 1983 employment discrimination claims arises regularly, and the federal courts are intractably divided. Only this Court can impose national uniformity on this recurring question.

II. The Question Presented Is Important, And This Case Is An Ideal Vehicle For Resolving The Deepening Split Among Lower Federal Courts.

The question presented in this appeal is not only recurring and unsettled; it also is extraordinarily important to state and local governments, and to the proper functioning of the comprehensive scheme that Congress has carefully crafted for resolving employment disputes. With the ADEA, Congress decided that these

disputes, specifically, should be resolved wherever possible through prompt notice and informal conciliation rather than litigation. Under the Seventh Circuit's rule, however, the more than one million state and local workers located in Illinois, Indiana, and Wisconsin may bypass the ADEA's dispute resolution process and go straight to court, undercutting the Act as a means of securing voluntary compliance with federal age discrimination laws.[1] The decision below also deprives States and local governments of the ADEA's prompt notice requirement and emphasis on conciliation. Whether Congress intended this anomalous result is an important question that warrants Supreme Court review.

The ADEA establishes a comprehensive remedial regime for age discrimination claims. See *Lorillard v. Pons*, 434 U.S. 575, 577-578 (1978) ("The enforcement scheme for the [ADEA] is complex—the product of considerable attention during the legislative debates preceding passage of the Act."). Parties wishing to file suit first must give notice promptly to the EEOC (generally within 180 days of the alleged discrimination, see 29 U.S.C. § 626(d)(1)(A)), at which point the EEOC "shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(d)(2); see also

---

[1] See U.S. Census Bureau, Government Employment & Payroll, 2011 State & Local Government, Illinois, Indiana, & Wisconsin, available at http://www.census.gov/govs/apes (and select relevant State in drop-down box under "2011 State & Local Government").

29 U.S.C. § 626(b) ("Before instituting any action under this section, the [EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."). Should the EEOC ultimately decide to file suit against the employer, moreover, the employee may not proceed separately with his or her own action. See 29 U.S.C. § 626(c)(1) ("[T]he right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter.").

The ADEA also imports elements of the Fair Labor Standards Act's (FLSA) remedial scheme. See 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 211(b), involving federal cooperation with state and local agencies; parts of § 216, involving, *inter alia*, damages and attorney's fees and costs; and § 217, involving injunctions). "Thus, not only is the ADEA's remedial scheme itself comprehensive, but it gains added comprehensiveness through inclusion of elaborate and extensive procedures under the FLSA." David C. Miller, *Alone in its Field: Judicial Trend to Hold that the ADEA Preempts § 1983 in Age Discrimination in Employment Claims*, 29 Stetson L. Rev. 573, 586 (2000).

Allowing state and municipal employees to sue separately under § 1983 invites them to evade the ADEA's carefully constructed remedial regime in obvious ways. Parties would have "direct and immediate access to the federal courts, [the Act's] comprehensive administrative process would be

bypassed, and the goal of compliance through mediation would be discarded." *Zombro*, 868 F.2d at 1366; see *id.* at 1367 ("[I]f * * * § 1983 is available to the ADEA litigant, the congressional scheme behind ADEA enforcement could easily be undermined if not destroyed."); *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1448 (5th Cir. 1992) ("'By establishing the ADEA's comprehensive scheme for the resolution of employee complaints of age discrimination, Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA.'") (quoting *Ring*, 652 F. Supp. at 482). "'An impatient plaintiff might unilaterally dispense with the informal negotiations contemplated by Congress,'" for example, "'needlessly casting all concerned into costly litigation.'" *Britt*, 978 F.2d at 1449 (quoting *McCroan v. Bailey*, 543 F. Supp. 1201, 1209 (S.D. Ga. 1982)); see also *Phillis*, 2010 WL 1390663, at *10 ("if a plaintiff were allowed [to proceed under § 1983] * * * , she would be able to avoid the statutory framework established by Congress to deal with age discrimination claims"). This is precisely what the ADEA set out to avoid.

At the same time, plaintiffs could bypass the EEOC entirely, notwithstanding the critical role Congress assigned it under the Act. See *Frye v. Grandy*, 625 F. Supp. 1573, 1575 (D. Md. 1986) ("The role of the EEOC is central to effectuating the policies of the [ADEA]," for "[i]nformal conciliation pursued by the EEOC is the primary method of dispute resolution envisioned by the [ADEA]."). And plaintiffs could seek punitive damages under § 1983, see, *e.g.*, *Smith v. Wade*, 461 U.S. 30, 35-36, 51, 56 (1983), a form of relief

unavailable under the ADEA, see *Ahlmeyer*, 555 F.3d at 1059, which instead affords a limited, liquidated damages recovery, see 29 U.S.C. § 626(b); 29 U.S.C. § 216(b) (incorporated into § 626(b) by reference).

There are approximately 20 million state and local employees nationwide,[2] and whether § 1983 is available to circumvent the ADEA's comprehensive remedial regime—including its requirements of prompt notice, informal dispute resolution, and EEOC participation—is an important and frequently recurring question requiring this Court's immediate review. The answer should not vary (as it does now) from State to State and, in places, among federal judges or between federal and state judges within a State.

Moreover, this case is an ideal vehicle to resolve that question. The parties exhaustively briefed ADEA exclusivity in the Seventh Circuit, and the court expressly decided that issue in a thorough opinion. It is a purely legal question that does not turn on any disputed issues of fact. And because respondent is exempt from the ADEA's protections, for he is not an "employee" within the meaning of the Act, see App. 68a, the Court's resolution of the question presented in petitioners' favor would fully dispose of respondent's age discrimination claim.

---

[2] See U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 461 (Governmental Employment & Payrolls: 1982 to 2009), available at http://www.census.gov/compendia/statab/2012/tables/12s0461.pdf.

III. The Seventh Circuit's Rule Follows From A Misreading Of This Court's Precedent.

Finally, the Seventh Circuit's decision not only exacerbates a split among lower federal courts on an important and recurring issue, but it misapplies this Court's case law to reach the wrong result.

In enacting a new law, Congress may displace a remedy under § 1983 either "expressly, by forbidding recourse to § 1983 in the statute itself, *or impliedly*, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (emphasis added). Even without an express statement by Congress, therefore, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20; see also *Rancho Palos Verdes*, 544 U.S. at 121 ("The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."). This is because, when a law includes a detailed remedial structure, courts must presume that Congress did not intend to invite plaintiffs to use § 1983 to bypass that structure. See *Smith*, 468 U.S. at 1012 ("Allowing a plaintiff to circumvent the [Education of the Handicapped Act (EHA)] administrative remedies would be inconsistent with Congress' carefully tailored scheme."). This Court has applied that reasoning to displace § 1983 as a remedy for rights conferred by statute, see *Rancho Palos Verdes*, 544 U.S. at 119-125;

Sea Clammers, 453 U.S. at 19-21, as well as rights arising under the Constitution, see *Smith*, 468 U.S. at 1008-1013; *Preiser*, 411 U.S. at 489-500.

Here, the Seventh Circuit acknowledged that "the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights, akin to the one in *Sea Clammers* and *Rancho Palos Verdes*," App. 23a, a regime that includes (as discussed in Part II) an emphasis on prompt notice, informal dispute resolution, creation of a significant role for the EEOC, and limitations on potential remedies. Nor can there be any dispute that allowing a competing cause of action for age discrimination under § 1983 would give state and municipal employees an end run around this remedial regime, precisely what *Sea Clammers* and its progeny seek to avoid.

Nevertheless, the Seventh Circuit read this Court's decisions to require something more than a comprehensive remedial regime before displacing a § 1983 remedy for the alleged violation of a constitutional right. In particular, the decision below stressed the absence of specific indications in the ADEA's text or legislative history of an intent to displace § 1983 remedies, and the court also cited certain differences between the substantive rights created by the ADEA and those embodied by the Equal Protection Clause (although the court "freely acknowledge[d] that ADEA's heightened scrutiny provides a *stronger* mechanism [than equal protection] for plaintiffs to challenge age discrimination in employment"). App. 29a (emphasis added). The Seventh Circuit's rule—that a comprehensive, statutory remedial regime is not alone

grounds to displace a competing, § 1983 remedy that would undermine that statutory regime—appears nowhere in this Court's jurisprudence. Indeed, although the Seventh Circuit relies most heavily on *Smith* and *Fitzgerald*, neither decision supports the ruling below.

Smith held that the EHA displaced the plaintiff's equal protection claim under § 1983. And while the Seventh Circuit is correct that the EHA includes some reference to constitutional claims, see App. 26a-27a, that is not surprising in a law that (unlike the ADEA) regulates exclusively the conduct of government actors, who are alone subject to constitutional constraints. Critically, however, the Court gave no indication in *Smith* that it would have reached a different result without those statutory references. On the contrary, the Court instead emphasized the "comprehensive nature of the procedures and guarantees" that the EHA established. 468 U.S. at 1011. There, as here, "[a]llowing a plaintiff to circumvent the [statute's] administrative remedies would be inconsistent with Congress' carefully tailored scheme." *Id.* at 1012.

Nor does *Fitzgerald* support the Seventh Circuit's ruling. In rejecting the defendants' claim there that Title IX of the Civil Rights Act displaces § 1983 equal protection claims, the Court observed that Title IX differed in some respects substantively from the Equal Protection Clause. See 555 U.S. at 256-258. But the Court saw that merely as "further support" for its initial conclusion, earlier in the opinion, that Title IX does not displace equal protection claims because the former has none of the complex, remedial measures required by *Sea Clammers* and *Smith*. See *id.* at 255-256.

In fact, *Fitzgerald* reaffirmed that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, [this Court has] placed primary emphasis on the nature and extent of that statute's remedial scheme," and further observed—contrary to the Seventh Circuit's decision here—that this "focus[] on the statute's detailed remedial scheme" applies equally when displacing constitutional claims. *Id.* at 253, 254. Thus, the *Fitzgerald* Court reasoned, whereas "the statutes at issue" in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes* "required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit," Title IX "has no administrative exhaustion requirement and no notice provisions." *Id.* at 254, 255. In fact, on its face Title IX offers "no express private remedy" at all, "much less a more restrictive one." *Id.* at 256. Rather, the right to sue under that statute was judicially implied, and the Supreme Court has "never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation." *Ibid.*

Not only is the Seventh Circuit's rule without support in this Court's case law, but it also runs counter to the special deference usually afforded the government in its role as employer. "[T]he Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Sampson v. Murray*, 415 U.S. 61, 83 (1974) (internal quotation marks omitted); see also *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, *J.*, concurring) ("Government, as an

employer, must have wide discretion and control over the management of its personnel and internal affairs"). And the ADEA reflects this deference; it does not apply to state elected officials, their personal staff, appointees at the policymaking level, or legal advisors. See 29 U.S.C. § 630(f). With these exemptions, Congress afforded States maximum leeway when employing persons who, like respondent here, must "perform to [an elected official's] personal satisfaction rather than to the more generalized standards applied to other * * * workers," *Monce v. San Diego*, 895 F.2d 560, 561 (9th Cir. 1990) (internal quotation marks omitted), or in whom the official "must place a significant degree of trust," *EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985). And contrary to the Seventh Circuit's presumption that these carve-outs in the ADEA favor preserving a competing § 1983 remedy, see App. 33a, these state-specific exemptions make it all the more implausible that Congress intended to invite state employees to bypass them using § 1983.

And indeed, it is *only* state and municipal workers, alone among all U.S. employees, that may circumvent the ADEA's remedial regime under the Seventh Circuit's rule. It is undisputed that the ADEA forecloses constitutional claims by *federal* employees. See, *e.g.*, *Paterson v. Weinberger*, 644 F.2d 521, 524-525 (5th Cir. 1981); see also *supra* p. 8. And because private employers are not state actors, they cannot be subject to § 1983 claims, either. See, *e.g.*, *Rehberg v. Paulk*, 132 S. Ct. 1497, 1505 (2012). That leaves state and local government workers, but with nothing in the ADEA's text or legislative history to suggest that these workers

alone should retain the ability to bypass the Act—on the contrary, with clear evidence in the ADEA that Congress intended to disqualify certain high-level state workers from bringing suit for alleged age discrimination—the Seventh Circuit's rule is all the more implausible as a reflection of congressional intent.

* * *

In short, the federal courts are intractably divided over the question presented in this petition, it is a recurring question of national significance, and the Seventh Circuit erred based on a misreading of this Court's case law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

JANUARY 2013

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 11-2820.

HARVEY N. LEVIN,

Plaintiff-Appellee,

v.

LISA MADIGAN, IN HER INDIVIDUAL CAPACITY,
ANN SPILLANE, ALAN ROSEN, ROGER FLAHAVEN,
AND DEBORAH HAGAN,

Defendants-Appellants,

LISA MADIGAN, AS ATTORNEY GENERAL OF ILLINOIS,
OFFICE OF THE ILLINOIS ATTORNEY GENERAL, AND
STATE OF ILLINOIS,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 07 C 4765—**Edmond E. Chang**, *Judge*.

ARGUED APRIL 3, 2012–DECIDED AUGUST 17, 2012.

Before BAUER, POSNER, and KANNE, *Circuit Judges*.

KANNE, Circuit Judge.

Harvey N. Levin worked as an Illinois Assistant Attorney General from September 5, 2000, until his termination on May 12, 2006. Levin was over the age of sixty at the time of his termination and believes he was fired because of his age and gender. Accordingly, Levin filed suit against the State of Illinois, the Office of the Illinois Attorney General, Illinois Attorney General Lisa Madigan, in her individual and official capacities, and four additional Attorney General employees in their individual capacities. He asserts claims for relief under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983. The individual-capacity defendants argued at the district court that they were entitled to qualified immunity with respect to Levin's § 1983 age discrimination claim. Specifically, they argued that Levin's § 1983 claim is precluded by the ADEA because the ADEA is the exclusive remedy for age discrimination claims. The district court disagreed and denied qualified immunity. The case is now before us on interlocutory appeal, and for the following reasons, we affirm the judgment of the district court.

I. BACKGROUND

Levin was fifty-five years old when he was hired as an Assistant Attorney General in the Office of the Illinois Attorney General's Consumer Fraud Bureau on September 5, 2000. On December 1, 2002, Levin was promoted to Senior Assistant Attorney General and retained this title until he was terminated on May 12, 2006. Levin was evaluated on an annual basis and his performance reviews indicate that he consistently met or exceeded his employer's expectations in twelve job categories. The Illinois Attorney General's Office asserts, however, that Levin's low productivity, excessive socializing, inferior litigation skills, and poor judgment led to his termination. Although not addressed in Levin's evaluations, these issues were discussed among Levin's supervisors and brought to Levin's attention.

Levin was one of twelve attorneys fired in May 2006. After he was terminated, Levin was replaced by a female attorney in her thirties. Two other male attorneys from the Consumer Fraud Bureau, both over the age of forty, were also terminated and replaced by younger attorneys, one male and one female. The Illinois Attorney General's Office disputes that these new hires "replaced" the terminated attorneys because the younger attorneys were not assigned the three former attorneys' cases.

Levin filed his complaint in the Northern District of Illinois on August 23, 2007, asserting claims of age and sex discrimination under the ADEA, Title VII, and the Equal Protection Clause via 42 U.S.C. § 1983. The defendants in this suit are divided into two groups for litigation purposes: (1) Lisa Madigan, in her official capacity as the Illinois Attorney General, the Office of the Illinois Attorney General, and the State of Illinois (the "Entity Defendants"), and (2) Lisa Madigan as an individual, Ann Spillane, Alan Rosen, Roger Flahaven, and Deborah Hagan (the "Individual Defendants"). Only the Individual Defendants have appealed to this court.

On November 26, 2007, the Entity Defendants and the Individual Defendants filed separate motions to dismiss Levin's complaint in its entirety. On December 12, 2007, the district court stayed discovery, requiring Levin to respond to the Entity Defendants's motion as to whether he was an "employee" for purposes of the ADEA and Title VII. On September 12, 2008, the district court held that Levin was an "employee" and lifted the stay on discovery. The Entity Defendants filed a second motion to dismiss shortly thereafter. Following discovery, the Entity Defendants and the Individual Defendants filed separate motions for summary judgment on November 13, 2009.

The district court ruled on the five pending motions in two separate opinions, both of which are pertinent to the issues before this court. In the first opinion, decided March 10, 2010, the Honorable David H. Coar addressed the three pending motions to dismiss. *See Levin v. Madigan,* 697 F. Supp. 2d 958 (N.D. Ill. 2010) [hereinafter *Levin I*]. Relevant to this appeal, Judge Coar granted the Individual Defendants' motion to dismiss Levin's § 1983 equal protection claim for age discrimination. *Id.* at 972. In that motion, the Individual Defendants asserted that the § 1983 claim was either precluded by the ADEA or they were entitled to qualified immunity. After acknowledging that the Seventh Circuit has yet to address ADEA exclusivity, Judge Coar held that the ADEA does not foreclose Levin's § 1983 equal protection claim. *Id.* at 971. But Judge Coar granted qualified immunity for the Individual Defendants because the availability of such a claim was not clearly established at the time Levin was terminated. *Id.* at 972 ("Indeed, this Court's lengthy analysis of the availability of such claims demonstrates that the law is not clearly established.").

On January 7, 2011, Levin's case was reassigned to the Honorable Edmond E. Chang. Judge Chang issued an opinion on July 12, 2011, granting in part and denying in part the two pending motions for summary judgment. *Levin v. Madigan,* No. 07 C 4765, 2011 WL 2708341, at *23 (N.D. Ill. July 12, 2011) [hereinafter

Levin II]. Judge Chang did not disturb Judge Coar's ruling that the ADEA is not the exclusive remedy for age discrimination claims. *Id.* at *8. He did, however, reverse two of Judge Coar's prior rulings, in light of additional briefing. First, Judge Chang determined that Levin is not an "employee" for purposes of Title VII and the ADEA, thus foreclosing any claim Levin could bring under those statutes. *See id.* at *11. Second, Judge Chang held that the Individual Defendants were not entitled to qualified immunity on Levin's § 1983 claim for age discrimination. *Id.* at *12-13. Rejecting Judge Coar's reasoning, Judge Chang noted that "[w]hen determining whether qualified immunity applies to protect a defendant, the question is whether a reasonable official would have known that the official was violating a clearly established constitutional right, which is a substantive question, not a question concerning whether a particular procedural vehicle (*i.e.*, cause of action) is available." *Id.* at *12. Because it is clearly established that the Fourteenth Amendment forbids arbitrary age discrimination, *see Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000), Judge Chang held that qualified immunity did not apply and Levin had established a genuine issue of material fact such that his § 1983 age discrimination claim could proceed to trial. *Levin II*, 2011 WL 2708341, at *20. The Individual Defendants filed this timely appeal, asking this court to find that they are entitled to qualified

immunity because the ADEA is the exclusive remedy for Levin's age discrimination claims.

II. ANALYSIS

A. Appellate Jurisdiction

Levin does not dispute that we have jurisdiction over an order denying qualified immunity under the collateral order doctrine. *See Surita v. Hyde,* 665 F.3d 860, 868 (7th Cir. 2011). But Levin believes this court lacks jurisdiction over the issue of whether the ADEA precludes a § 1983 equal protection claim. Levin asserts that this issue, resolved in Judge Coar's opinion, is not inextricably intertwined with Judge Chang's denial of qualified immunity. *See Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.,* 626 F.3d 973, 976-77 (7th Cir. 2010) (doctrine of pendent jurisdiction allows appellate court to review an interlocutory order that is inextricably intertwined with an appealable order).

We disagree with Levin's analysis. Instead, we believe this case is analogous to *Wilkie v. Robbins,* 551 U.S. 537 (2007). In *Wilkie,* on an interlocutory appeal of the denial of qualified immunity, the Supreme Court considered whether a new, freestanding damages remedy should exist under *Bivens. Id.* at 548-50 (*citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971)). The Supreme Court

held that it had jurisdiction to consider whether such a remedy existed because the recognition of an entire cause of action is "directly implicated by the defense of qualified immunity." *Id.* at 549 n.4 (*quoting Hartman v. Moore,* 547 U.S. 250, 257 n.5 (2006)). Similar to *Wilkie,* the very existence of a freestanding damages remedy under § 1983 is directly implicated by a qualified immunity defense such that we have jurisdiction over this appeal. Thus, we first consider whether the ADEA precludes a § 1983 equal protection claim before we turn to the issue of qualified immunity.

B. General Preclusion of § 1983 Claims

Section 1 of the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, "authorizes suits to enforce individual rights under federal statutes as well as the Constitution" against state and local government officials. *City of Rancho Palos Verdes, Cal. v. Abrams,* 544 U.S. 113, 119 (2005). Section 1983 does not create substantive rights, but operates as "a means for vindicating federal rights conferred elsewhere." *Padula v. Leimbach,* 656 F.3d 595, 600 (7th Cir. 2011) (*quoting Ledford v. Sullivan,* 105 F.3d 354, 356 (7th Cir. 1997)).

In evaluating the limits of relief available under § 1983 for statutory claims, the Supreme Court has held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may

suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). In *Sea Clammers*, the Supreme Court held that a suit for damages under the Federal Water Pollution Control Act ("FWPCA") or Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA") could not be brought pursuant to § 1983 because both Acts "provide quite comprehensive enforcement mechanisms." *Id.* These mechanisms include citizen-suit provisions, which allow private citizens to sue for prospective relief, and notice provisions requiring such plaintiffs to notify the EPA, the State, and the alleged violator before filing suit. *Id.* at 6.

Over two decades after *Sea Clammers*, the Supreme Court again rejected a plaintiff's attempt to seek damages under § 1983 for violation of a statute which provided its own, more restrictive judicial remedy. *See Rancho Palos Verdes*, 544 U.S. at 121-23. In *Rancho Palos Verdes*, the plaintiff filed suit for injunctive relief under the Telecommunications Act of 1996 ("TCA") and sought damages and attorney's fees under § 1983 after a city planning committee denied his request for a conditional-use permit for an antenna tower on his property. *Id.* at 117-18. The TCA "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications]

facilities." *Id.* at 115. When a permit is requested and denied, the TCA requires local governments to provide a written decision, supported by substantial evidence, within a reasonable period of time. *Id.* at 116. An individual may seek judicial review within thirty days of this decision, *id.*, and the court is required to hear and decide the case on an expedited basis, *id.* at 122. Further, a plaintiff may not be entitled to compensatory damages and cannot recover attorney's fees and costs. *Id.* at 122-23.

In discerning congressional intent, the Court held that "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id.* at 121. Conversely, the Court noted that "in *all* of the cases in which we have held that § 1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue ... *did not* provide a private judicial remedy ... for the rights violated." *Id.* Because the TCA's provisions limit the relief available to private individuals and provide for expedited judicial review, the Court held that the TCA precludes relief under § 1983. *Id.* at 127.

While the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes* sought to assert federal *statutory* rights under § 1983, two other Supreme Court cases have examined whether a plaintiff is precluded from

asserting *constitutional* rights under § 1983 when a remedial statutory scheme also exists. In *Smith v. Robinson,* the Supreme Court held that Congress intended the Education of the Handicapped Act ("EHA"), 91 Pub. L. No. 230, 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et. seq.* (1982), "to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." 468 U.S. 992, 1009 (1984), *superseded by statute,* Handicapped Children's Protection Act of 1986, Pub. L. No. 99–372, 100 Stat. 796. The EHA was designed to "aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Id.* The Act established "an enforceable substantive right to a free appropriate public education" and "an elaborate procedural mechanism to protect the rights of handicapped children." *Id.* at 1010-11. Under the EHA, plaintiffs were entitled to a fair and adequate state hearing, detailed procedural safeguards, and judicial review. *Id.* at 1011. Relying on the comprehensive statutory scheme and legislative history, the Supreme Court held that Congress did not intend to allow a handicapped child to bypass the EHA and go directly to court with a § 1983 equal protection claim as "such a result [would] render

superfluous most of the detailed procedural protections in the statute." *Id.*[1]

In *Preiser v. Rodriguez*, the Supreme Court considered whether state prisoners deprived of good-time credits could pursue their claims for equitable relief under § 1983 or if such a remedy was unavailable because of the habeas corpus statutes, 28 U.S.C. §§ 2241, 2254. 411 U.S. 475, 477 (1973). The Supreme

---

[1] Notably, Congress disagreed with the Supreme Court's interpretation of its intent. In the Handicapped Children's Protection Act of 1986, Pub. L. No. 99–372, 100 Stat. 796 (1986), Congress added the following provision to the EHA:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act ... of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.

Thus, although Congress requires a handicapped plaintiff asserting a claim for free appropriate education to first exhaust his or her administrative remedies under the EHA, § 1983 equal protection claims are no longer precluded. *See Bd. of Educ. of E. Windsor Reg'l Sch. Dist. v. Diamond*, 808 F.2d 987, 995 (3d Cir.1986).

Court discussed the history of habeas corpus and recognized that "over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law." *Id.* at 485. Procedurally, the writ requires a prisoner to exhaust his adequate state remedies prior to seeking federal judicial relief. *Id.* at 489. The Court held that Congress intended habeas corpus to be the sole remedy, as "[i]t would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings." *Id.* at 489-90.

Although we have highlighted the four opinions in *Sea Clammers, Rancho Palos Verdes, Smith*, and *Preiser*, each of which found a § 1983 claim precluded, the Supreme Court does not "lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federal right. *Smith,* 468 U.S. at 1012 (noting that § 1983 has always been "an independent safeguard against deprivations of federal constitutional and statutory rights"). In fact, the Court has rejected § 1983 preclusion arguments in several other cases. *See, e.g., Blessing v. Freestone,* 520 U.S. 329, 348 (1997) (if Title IV-D of the Social Security Act gives rise to individual rights, its enforcement scheme contains no private remedy and is not comprehensive enough to preclude § 1983 liability);

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 520-23 (1990) (unlike the statutory schemes in *Sea Clammers* and *Smith*, "[t]he Medicaid Act contains no comparable provision for private judicial or administrative enforcement" and its administrative scheme is not "sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983"); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 427-29 (1987) (Department of Housing and Urban Development's generalized powers under its regulations and an amendment to the Housing Act were not sufficiently comprehensive to foreclose a § 1983 remedy).

Most recently, the Supreme Court considered whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), precludes a § 1983 equal protection claim. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009). The Court first acknowledged the importance of discerning congressional intent and summarized its prior rulings, stating:

> In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely

> that Congress intended to displace § 1983 suits enforcing constitutional rights. Our conclusions regarding congressional intent can be confirmed by a statute's context.

Id. at 252-53. The Court also recognized that, in its prior opinions finding preclusion, the statutes at issue required plaintiffs to exhaust their administrative remedies or comply with other procedural requirements before filing suit. *Id.* at 254. "Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes." *Id.*

Turning to the statute before it, the Supreme Court examined Title IX's remedial scheme and determined that Title IX does not preclude a § 1983 equal protection claim. Title IX prohibits discrimination on the basis of gender in educational programs that receive federal financial assistance. *Id.* at 255 (*quoting* 20 U.S.C. § 1681(a)). Two enforcement mechanisms exist: (1) "an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance" and (2) an implied private right of action, through which a plaintiff may seek injunctive relief and recover damages. *Id.* A plaintiff suing under Title IX is not required to exhaust any administrative remedies or provide notice before filing suit; instead, "plaintiffs can

file directly in court and can obtain the full range of remedies." *Id.* (internal citation omitted). Further, Congress failed to include an express private right remedy, and the Court "has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation." *Id.* at 256.

The Court also emphasized the differences between the protections guaranteed by Title IX and the Equal Protection Clause. First, Title IX permits a plaintiff to sue institutions and programs receiving federal funding, but does not authorize suit against school officials, teachers, or other individuals. *Id.* at 257. In contrast, § 1983 equal protection claims reach state actors, including individuals, municipalities, and other state entities. *Id.* Second, some policies that are exempted under Title IX could still be subject to claims under the Equal Protection Clause. *Id.* (*citing United States v. Virginia,* 518 U.S. 515, 534 (1996) (male-only admissions policy at Virginia Military Institute would not violate Title IX but did violate the Equal Protection Clause); *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 731 (1982) (policy of admitting only females at traditionally single-sex college violated the Equal Protection Clause, but such policies are exempted under Title IX)). Finally, the Court noted that "the standards for establishing liability may not be wholly congruent." *Id.* For example, a Title IX plaintiff may only have to

show that a school administrator acted with deliberate indifference while a § 1983 plaintiff must demonstrate the existence of a municipal custom, policy, or practice. *Id.* at 257-58. Because of these differences and the absence of a comprehensive remedial scheme, the plaintiffs' § 1983 equal protection claim was not precluded.

We conclude from these cases that, in determining whether a § 1983 equal protection claim is precluded by a statutory scheme, the most important consideration is congressional intent. Congressional intent may be construed from the language of the statute and legislative history, *Smith,* 468 U.S. at 1009, the statute's context, *Rancho Palos Verdes,* 544 U.S. at 127 (Breyer, J., concurring), the nature and extent of the remedial scheme, *Sea Clammers,* 453 U.S. at 20, and a comparison of the rights and protections afforded by the statutory scheme versus a § 1983 claim, *Fitzgerald,* 555 U.S. at 252-53. A statutory scheme may preclude a § 1983 constitutional claim, *see Smith,* 468 U.S. at 1013, especially if a § 1983 claim circumvents the statute's carefully tailored scheme and provides access to benefits unavailable under that scheme, *Fitzgerald,* 555 U.S. at 254. Keeping these concepts in mind, we now turn to the issue before us: whether the ADEA precludes a § 1983 equal protection claim.

C. ADEA Preclusion of § 1983 Claims

Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The ADEA makes it unlawful for an employer to "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual ... because of such individual's age." *Id.* § 623(a)(1). In general, the ADEA provides coverage for private, state, and federal employees who are forty years of age and older, *id.* §§ 630(f), 631(a), 633a(a), albeit with a few notable exceptions, *see id.* §§ 623(j), 630(f). The Act "incorporates some features of both Title VII and the Fair Labor Standards Act of 1938 [FLSA], which has led [the Supreme Court] to describe it as 'something of a hybrid.'" *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (*quoting Lorillard v. Pons*, 434 U.S. 575, 578 (1978)). Specifically, the substantive provisions of the ADEA are modeled after Title VII, while its remedial provisions incorporate provisions of the FLSA. *Id.*; 29 U.S.C. § 626(b).

The ADEA expressly grants individual employees a private right of action. *McKennon*, 513 U.S. at 358 (*citing* 29 U.S.C. § 626(c) ("Any person aggrieved may

bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.")). An ADEA plaintiff must first file a charge with the Equal Employment Opportunity Commission (EEOC), generally within 180 days of the unlawful age discrimination. 29 U.S.C. § 626(d)(1). The EEOC then notifies all parties involved and, if the EEOC believes there has been a violation, the agency "promptly seek[s] to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." *Id.* § 626(d)(2). If the EEOC charge is dismissed or terminated, the EEOC is required to notify the plaintiff. *Id.* § 626(e).

Sixty days after filing an EEOC charge, a plaintiff is entitled to file a civil lawsuit and, if he seeks damages, receive a trial by jury. *Id.* § 626(c)(1)-(2). This right terminates, however, if the EEOC files its own lawsuit to enforce the plaintiff's claim. *Id.* § 626(c)(1). "When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees." *McKennon,* 513 U.S. at 357. If a violation was willful, a plaintiff may recover liquidated damages. *Id.* "The Act also gives federal courts the discretion to 'grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act].'" *Id.* at 357-58 (*quoting* 29 U.S.C. § 626(b)).

Whether the ADEA precludes a § 1983 equal protection claim is a matter of first impression in the Seventh Circuit. All other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims, largely relying on the Fourth Circuit's reasoning in *Zombro v. Baltimore City Police Department,* 868 F.2d 1364 (4th Cir. 1989). *See, e.g., Ahlmeyer v. Nev. Sys. of Higher Educ.,* 555 F.3d 1051, 1057 (9th Cir. 2009); *Tapia-Tapia v. Potter,* 322 F.3d 742, 745 (1st Cir. 2003); *Migneault v. Peck,* 158 F.3d 1131, 1140 (10th Cir. 1998), *vacated on other grounds sub nom., Bd. of Regents of Univ. of N.M. v. Migneault,* 528 U.S. 1110 (2000); *Lafleur v. Tex. Dep't of Health,* 126 F.3d 758, 760 (5th Cir. 1997); *Chennareddy v. Bowsher,* 935 F.2d 315, 318 (D.C. Cir. 1991). District courts located in other circuits, however, are split on the issue. *Compare Shapiro v. N.Y. City Dep't of Educ.,* 561 F. Supp. 2d 413, 420 (S.D.N.Y. 2008) (weight of authority in the Second Circuit holds that the ADEA does not preclude a § 1983 claim), *and Mustafa v. State of Neb. Dep't of Corr. Servs.,* 196 F. Supp. 2d 945, 956 (D. Neb. 2002) (the ADEA does not impliedly repeal § 1983 constitutional claims), *with Kelley v. White,* No. 5:10CV00288, 2011 WL 4344180, at *3 (E.D. Ark. Sept. 15, 2011) (the ADEA is the exclusive remedy for age discrimination claims), *and Phillis v. Harrisburg Sch. Dist.,* No. 1:07–cv–1728, 2010 WL 1390663, at *10 (M.D. Pa. Mar. 31, 2010) (same). In the present case, two district court judges from the Northern District of

Illinois held that the ADEA does not preclude a § 1983 equal protection claim. *Accord McCann v. City of Chicago*, Nos. 89 C 2879 & 90 C 0464, 1991 WL 2538, at *2 (N.D. Ill. Jan. 8, 1991).

In *Zombro*, the Fourth Circuit held that allowing a plaintiff to seek recovery for age discrimination through a § 1983 equal protection claim would undermine the comprehensive remedial scheme set forth in the ADEA. 868 F.2d at 1366-67. Citing the ADEA's provisions requiring notice to the EEOC, informal conciliation, and termination of a plaintiff's action upon the filing of a complaint by the EEOC, the court believed that if a plaintiff could pursue a § 1983 action instead, "[t]he plaintiff would have direct and immediate access to the federal courts, the comprehensive administrative process would be bypassed, and the goal of compliance through mediation would be discarded." *Id.* at 1366. Where Congress has enacted a comprehensive statutory scheme, such as the ADEA, the Fourth Circuit holds that preclusion of § 1983 suits is appropriate "unless the legislative history of the comprehensive statutory scheme in question manifests a congressional intent to allow an individual to pursue independently rights under both the comprehensive statutory scheme and other applicable state and federal statutes, such as 42 U.S.C. § 1983." *Id.* at 1369. The Fourth Circuit found no such intent in the language and history of the ADEA. *Id.* That court also relied upon the ADEA's adoption of

Section 216 of the FLSA, which has been held to be "the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA." *Id.* (*citing Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027 (N.D. Cal.1972)). To the court, this shared provision, along with the ADEA's precisely drawn statutory scheme, evidenced congressional intent that the ADEA be the exclusive remedy for age discrimination suits. *Id.*

Several circuit courts addressing ADEA preclusion have simply relied on *Zombro*'s holding. *See, e.g., Tapia-Tapia,* 322 F.3d at 745 ("The ADEA provides the exclusive federal remedy for age discrimination in employment." (*citing Zombro,* 868 F.2d at 1369)); *Chennareddy,* 935 F.2d at 318 (same). But not all district court judges are convinced. The leading district court case rejecting ADEA preclusion of § 1983 equal protection claims is *Mummelthie v. City of Mason City, Iowa,* 873 F. Supp. 1293 (N.D. Iowa 1995). In that case, Judge Bennett sharply criticized the Fourth Circuit's analysis in *Zombro,* noting that the court failed to consider the statutory language and legislative history of the ADEA, as well as its similarities to Title VII, a statutory scheme which does not preclude § 1983 claims. *Id.* at 1319, 1322 (*citing, e.g., Trigg v. Fort Wayne Cmty. Sch.*, 766 F.2d 299, 302 (7th Cir. 1985) ("A plaintiff may sue her state government employer for violations of the Fourteenth Amendment through §

1983 and escape Title VII's comprehensive remedial scheme, even if the same facts would suggest a violation of Title VII.")).

Given the conflicting case law, further review of this issue is required. Although the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights, akin to *Sea Clammers* and *Rancho Palos Verdes*, we find that it does not preclude a § 1983 claim for constitutional rights.[2] While admittedly a close call, especially in light of the conflicting decisions from our sister circuits, we base our holding on the ADEA's lack of legislative history or statutory language precluding constitutional claims, and the divergent rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim. *Cf. Fitzgerald*, 555 U.S. at 252-53.

1. Statutory Text and Legislative History

Nothing in the text of the ADEA expressly precludes a § 1983 claim or addresses constitutional rights. *See Zombro*, 868 F.2d at 1374 (Murnaghan, J., concurring in part and dissenting in part). Nor does the legislative

---

[2] Because this decision creates a conflict among the circuits, this opinion has been circulated before release to all active judges under Circuit Rule 40(e). No judge favored a hearing en banc; Circuit Judge Flaum did not participate in the consideration or decision of this case.

history provide clear guidance on this issue.[3] Although

---

[3] *Mummelthie* and other district courts rely, in part, on the legislative history of the ADEA in finding that Congress did not intend to preclude § 1983 equal protection claims. In 1972, Senator Lloyd Bentsen sponsored an ADEA amendment to subject federal, state, and local government employers to the ADEA. *See* 118 Cong. Rec. 15,895 (1972). At the time, a similar Title VII amendment hadbeen proposed, and an unidentified committee report stated that federal, state, and local employees should be entitled "to the same benefits and protections in equal employment as the employees in the private sector." *Id.* After citing this report, Senator Bentsen argued that "the principles underlying these provisions in the EEOC bill are directly applicable to the [ADEA]." *Id.* In a House report addressing the Title VII amendment, Congress clearly acknowledged the continued viability of a § 1983 claim. H.R.Rep. No. 92–238, at 18 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154 ("In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to [42 U.S.C. §§ 1981, 1983], is in no way affected."). *Mummelthie* therefore concludes that Senator Bentsen's comment implies that the same non-preclusion principle applies to the ADEA. 873 F. Supp. at 1325-26.

Although at first blush, Senator Bentsen's remark appears to support *Mummelthie*'s reasoning, his comments are somewhat ambiguous and it's unclear whether he was referencing H.R.Rep. No. 92-238 and the committee's statement that § 1983 claims were "in no way affected." Given the ambiguous nature of Senator Bentsen's remark, we have a difficult time relying on it as proof of congressional intent.

the *Zombro* court interpreted this lack of explicit language or legislative history as congressional intent not to allow individuals to pursue constitutional rights outside of the ADEA's scheme, *see id.* at 1369, we reach the opposite conclusion. Congress's silence on the issue tells us nothing about preclusion—we do not know whether Congress even considered alternative constitutional remedies in enacting the ADEA.

We agree with the *Zombro* majority that the ADEA sets forth a rather comprehensive remedial scheme. The ADEA provides a private right of action, requires notice and exhaustion of remedies, and limits the damages available under the Act. *See* 29 U.S.C. § 626(b), (d)(1)-(2). Like *Sea Clammers* and *Rancho Palos Verdes,* this scheme speaks volumes as to how Congress intended allegations of *statutory* age discrimination to proceed.

But, as to constitutional claims, we do not believe Congress's intent is as apparent as other circuit courts have found. As noted in *Mummelthie,* "the ADEA does not purport to provide a remedy for violation of federal constitutional rights" and no express language indicates that Congress intended to foreclose relief under § 1983 for constitutional violations. 873 F. Supp. at 1325. Beyond that, we have a hard time concluding that Congress's mere creation of a statutory scheme for age discrimination claims was intended to foreclose preexisting constitutional claims. Congress frequently

enacts new legal remedies that are not intended to repeal their predecessors. *See, e.g., Salinas v. United States*, 522 U.S. 52, 64 (1997) (comparing the general criminal conspiracy statute to the later-enacted Racketeer Influenced and Corrupt Organizations Act (RICO)). Accordingly, the Supreme Court has emphasized on several occasions that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui v. Castaneda*, 130 S. Ct. 1845, 1853 (2010) (*quoting Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009)).

What, then, do we make of the Supreme Court's holdings in *Smith* and *Preiser*, which held that constitutional claims were barred by the existence of comprehensive statutory schemes? In both of those cases, the statutes at issue were specifically designed to address constitutional issues. For instance, the habeas corpus statutes in *Preiser* provide a remedy for prisoners "in custody in violation of *the Constitution* or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added); *accord* 28 U.S.C. § 2254(a). Similarly, the *Smith* court acknowledged that "[t]he EHA is a comprehensive scheme set up by Congress to aid the States in complying with *their constitutional obligations* to provide public education for handicapped children." 468 U.S. at 1009 (emphasis added). The statute itself provides that federal intervention is

necessary to "ensure equal protection of the law." 20 U.S.C. § 1400(c)(6). This goal is also referenced in the legislative history, as recognized in *Smith*. 468 U.S. at 1010 (*quoting* S. Rep. No. 94-168, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1437). These references demonstrate that Congress considered alternative constitutional remedies in enacting the EHA.

The ADEA is readily distinguishable. "In contrast to the statutes at issue in *Preiser* and in *Smith,* the ADEA does not purport to provide a remedy for violation of constitutional rights. Instead, it provides a mechanism to enforce only the substantive rights created by the ADEA itself." *Zombro,* 868 F.2d at 1373 (Murnaghan, J., concurring in part and dissenting in part). For the preclusion of *constitutional* claims, we believe more is required than a comprehensive statutory scheme. This notion is supported by the Supreme Court's references in *Smith* to the legislative history of the EHA. 468 U.S. at 1009 ("Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute."). Thus, in *Smith,* it was more than just the comprehensive remedial scheme that convinced the Court that the EHA is an exclusive remedy. In this way, *Smith* differs from

Sea Clammers and *Rancho Palos Verdes*, cases tasked only with determining whether § 1983 statutory claims were precluded by that statute's own comprehensive scheme. In sum, even though the ADEA is a comprehensive remedial scheme, without some additional indication of congressional intent, we cannot say that the ADEA's scheme alone is enough to preclude § 1983 constitutional claims.

The Ninth Circuit's recent *Ahlmeyer* decision raises one additional point on this issue that necessitates discussion, as the court relied upon our prior precedent. As background, because age is not a suspect classification, an equal protection claim of age discrimination in employment is subject only to rational basis review, in which the age classification must be rationally related to a legitimate state interest. *See Kimel,* 528 U.S. at 83-84. In contrast, the ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 86. Thus, the *Ahlmeyer* decision notes in its opinion that "[b]ecause the ADEA provides broader protection than the Constitution, a plaintiff has 'nothing substantive to gain' by also asserting a § 1983 claim." 555 F.3d at 1058 (*citing Williams v. Wendler,* 530 F.3d 584, 586 (7th Cir. 2008)).

In *Williams,* we briefly discussed the plaintiffs' failure to differentiate their Title VI and equal protection claims. 530 F.3d at 586. Citing *Sea Clammers,* we noted that "[w]hen Congress enacts a comprehensive scheme for enforcing a statutory right that is identical to a right enforceable under 42 U.S.C. § 1983, . . . the section 1983 lawsuit must be litigated in accordance with the scheme." *Id.* We then recognized that, according to the Supreme Court, Title VI proscribes only those racial classifications that violate the Equal Protection Clause. *Id.* (*quoting Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 287 (1978)). Thus, there was nothing to gain by asserting an equal protection claim, and failure to comply with Title VI's procedural requirements would have left the plaintiffs without a remedy. *Id.* But again, like *Smith,* Title VI's legislative history provides insight into Congress's intent. *See Bakke,* 438 U.S. at 286-87 ("In view of the *clear legislative intent,* Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause . . . ." (emphasis added)). In light of this clear congressional intent, *Williams* (like *Smith*) is also distinguishable from the ADEA. And while we freely acknowledge that the ADEA's heightened scrutiny provides a stronger mechanism for plaintiffs to challenge age discrimination in employment, absent any additional indication from Congress, we simply cannot infer that Congress intended to do away with a § 1983 constitutional

alternative. *See Smith*, 468 U.S. at 1012 ("Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights.").

Finally, the circuit courts rely upon Congress's incorporation of the FLSA's remedial scheme in finding that Congress intended to preclude a § 1983 constitutional remedy. *See Zombro*, 868 F.2d at 1369. This is a perplexing argument because the cases which have found the FLSA to be an exclusive remedy do not (and, in fact, cannot) address constitutional claims. *See Kendall v. City of Chesapeake, Va.*, 174 F.3d 437, 439 (4th Cir. 1999) ("We hold that the elaborate remedial scheme provided in the FLSA demonstrates a congressional intent to prohibit § 1983 actions *to enforce such FLSA rights.*" (emphasis added)); *Lerwill*, 343 F. Supp. at 1029 (same). Unlike Title VII and the ADEA, the rights created by the FLSA are not based on rights also guaranteed by the Constitution. Thus, cases addressing FLSA exclusivity speak little to the issue presently before this court. We have no quarrel with the notion that the FLSA is the sole remedy for the enforcement of FLSA rights and, similarly, the ADEA is the sole remedy for the enforcement of ADEA rights.[4]

---

[4] We have also recognized that a plaintiff may not seek to enforce rights conveyed by Title VII through a § 1983 claim. *See Trigg*, 766 F.2d at 301 (*citing Great Am. Fed. Sav. & Loan*

(continued...)

Even the district courts that believe the ADEA does not preclude § 1983 constitutional claims agree on this point. *See, e.g., Mustafa,* 196 F. Supp. 2d at 956 n.13 ("[S]ection 1983 cannot be used as an alternate mechanism to assert violation of the ADEA's provisions against states."); *Mummelthie,* 873 F. Supp. at 1317 ("The court has no dispute with the conclusions of those federal courts holding that . . . state, local, and private employees cannot use § 1983 to address violations based directly on the ADEA itself and not on independent, federal constitutional rights."). Because the FLSA lacks a constitutional counterpart, it provides little additional guidance beyond the statutory text.[5]

---

[4] (...continued)
Ass'n v. Novotny, 442 U.S. 366, 376 (1979)).

[5] Like many other district courts, Judge Coar relied upon Title VII and the ADEA's similarities in finding no preclusion, citing precedent from this court recognizing the two statutes' likenesses. *Levin I,* 697 F. Supp. 2d at 970. In those cases, we noted the statutes' similar "objectives, substantive prohibitions, and legislative histories," *Kelly v. Wauconda Park Dist.,* 801 F.2d 269, 271 (7th Cir. 1986), and recognized that Title VII "is the legislation which most closely parallels the ADEA." *EEOC v. Elrod,* 674 F.2d 601, 607 (7th Cir. 1982).

Although Title VII is certainly useful in interpreting substantive provisions of the ADEA, *see Kelly,* 801 F.2d at 271 (analyzing the ADEA's definition of an "employer"), it is less helpful in this instance. As several sources acknowledge, the remedial provisions of the ADEA, which we focus on in (continued...)

2. Comparison of Rights and Protections

Given the absence of any clear or manifest congressional intent in either the language of the statute or the legislative history, *Fitzgerald* directs us to compare the rights and protections afforded by the statute and the Constitution. 555 U.S. at 252. We believe the rights and protections afforded by the ADEA and § 1983 equal protection claims diverge in a few significant ways.

First, an ADEA plaintiff may only sue his employer, an employment agency, or a labor organization. *See* 29 U.S.C. § 623. In contrast, a § 1983 plaintiff may file suit against an individual, so long as that individual caused or participated in the alleged deprivation of the plaintiff's constitutional rights. *See Kuhn v. Goodlow*, 678 F.3d 552, 555-56 (7th Cir. 2012). A § 1983 plaintiff

---

[5] (...continued)
determining exclusivity, differ from those of Title VII. *See, e.g., Ahlmeyer*, 555 F.3d at 1058-59; David C. Miller, *Alone in its Field: Judicial Trend to Hold that the ADEA Preempts § 1983 in Age Discrimination in Employment Claims*, 29 Stetson L. Rev. 573, 593-95 (2000). Title VII's legislative history also speaks explicitly to the issue of § 1983 preclusion, while there is no similar history for the ADEA. *See Trigg*, 766 F.2d at 301 n.3. Thus, Title VII differs in a few significant ways and does not add much to our analysis.

may also sue a governmental organization, but only if he can demonstrate that the alleged constitutional violation was "caused by (1) an express municipal policy; (2) a widespread, though unwritten, custom or practice; or (3) a decision by a municipal agent with final policymaking authority." *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 780 (7th Cir. 2011) (internal quotation marks omitted). These divergent rights between the ADEA and a § 1983 constitutional claim seriously affect a plaintiff's choice of defendants and his strategy for presenting a prima facie case.

Second, the ADEA expressly limits or exempts claims by certain individuals, including elected officials and certain members of their staff, appointees, law enforcement officers, and firefighters. *See* 29 U.S.C. §§ 623(j), 630(f); *accord Fitzgerald,* 555 U.S. at 257 (no preclusion where some Title IX exemptions could form the basis of equal protection claims). The statutory scheme also prohibits claims by employees under the age of forty or those bringing so-called "reverse age discrimination" claims. *See Gen. Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581, 593 (2004) ("[T]he text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern."); *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992). There are no such limitations for § 1983 equal protection claims.

Finally, as a practical matter in light of the Supreme Court's decision in *Kimel,* state employees suing under the ADEA are left without a damages remedy, as such claims are barred by Eleventh Amendment sovereign immunity. 528 U.S. at 91-92. In contrast, "[m]unicipalities do not enjoy any kind of immunity from suits for damages under § 1983." *Benedix v. Vill. of Hanover Park, Ill.*, 677 F.3d 317, 318-19 (7th Cir. 2012) (*citing Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980)). Without the availability of a § 1983 claim, a state employee (like Levin) who suffers age discrimination in the course of his employment is left without a federal damages remedy. *See Mustafa,* 196 F. Supp. 2d at 955 ("[T]he practical effect [of ADEA preclusion] is elimination of all age discrimination claims made against state actors in federal court.").[6]

In light of our analysis of the ADEA and the relevant case law, and given these divergent rights and protections, we conclude that the ADEA is not the exclusive remedy for age discrimination in employment claims.

---

[6] *Mustafa* also notes that, despite *Kimel,* Congress "certainly *intended* to provide a remedy for age discrimination against state employers when it amended the ADEA in 1974." 196 F. Supp. 2d at 956. Thus, ADEA exclusivity seems inconsistent with Congress's intent to provide a federal forum for state employees. *Id.*

D. Qualified Immunity

Because the ADEA does not preclude Levin's § 1983 equal protection claim, we now turn to the issue of qualified immunity. We review a district court's denial of summary judgment based on qualified immunity *de novo*. *Surita*, 665 F.3d at 868. To determine whether state actors are entitled to qualified immunity, we consider "(1) whether the facts, taken in the light most favorable to the plaintiffs, show that the defendants violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation." *Gonzalez v. City of Elgin*, 578 F.3d 526, 540 (7th Cir. 2009) (*citing Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Beyond asserting that the ADEA precludes a § 1983 claim, the Individual Defendants do not challenge the first prong on appeal. Thus, for our purposes, we need only briefly discuss the second prong of the qualified immunity analysis.

"A right is clearly established when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 473-74 (7th Cir.2011) (internal quotation marks and brackets omitted) (*quoting Ashcroft v. al–Kidd*, 131 S. Ct. 2074, 2083 (2011)). Judge Coar's opinion granted qualified immunity as to Levin's § 1983 equal protection

claim, finding that "whether the Seventh Circuit permits equal protection claims for age discrimination in light of the ADEA is unclear." *Levin I*, 697 F. Supp. 2d at 972. Accordingly, Judge Coar believed that the constitutional right was not clearly established and qualified immunity was appropriate. *Id.* On reconsideration, Judge Chang reversed Judge Coar's ruling, noting that "irrational age discrimination is clearly forbidden by the Equal Protection Clause" and the issue of qualified immunity is "not a question concerning whether a particular procedural vehicle (*i.e.*, cause of action) is available." *Levin II*, 2011 WL 2708341, at *12.

We agree with Judge Chang. At the time of the alleged wrongdoing, it was clearly established that age discrimination in employment violates the Equal Protection Clause. *See Kimel*, 528 U.S. at 83. Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not "rationally related to a legitimate state interest." *Id.* Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is irrelevant, and as Judge Chang noted, it is "odd to apply qualified immunity in the context where the procedural uncertainty arises from the fact that Congress created a statutory remedy for age discrimination that is substantively *broader* than the equal protection clause." *Levin II*, 2011 WL 2708341, at *12. Because Levin's

constitutional right was clearly established, the Individual Defendants are not entitled to qualified immunity.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

Appendix B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Harvey Levin,	)	
	)	
Plaintiff,	)	Case No. 07 C 4765
	)	
v.	)	Judge Edmond E.
	)	Chang
Lisa Madigan, individually,	)	
and as Illinois Attorney	)	
General; Office of the	)	
Illinois Attorney General;	)	
State of Illinois; Ann	)	
Spillane; Alan Rosen;	)	
Roger P. Flahaven;	)	
and Deborah Hagan,	)	
	)	
Defendants.	)	

July 21, 2011

MEMORANDUM OPINION AND ORDER

Edmond E. Chang, District Judge.

Plaintiff Harvey Levin brings an action against the State of Illinois, the Office of the Illinois Attorney General, Lisa Madigan, individually and in her official capacity as Illinois Attorney General, and four senior members of the Office of the Illinois Attorney General in their individual capacities (collectively, "Defendants"), alleging that his employment was terminated on the basis of his age and gender. Levin's complaint sets forth the following claims: age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (Count 1); sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. (Count 2); sex discrimination in violation of the equal protection clause of the Fourteenth Amendment under 42 U.S.C. § 1983 (Count 3); and age discrimination in violation of the equal protection clause of the Fourteenth Amendment under 42 U.S.C. § 1983 (Count4). Despite their occasionally overlapping strategies, Defendants split into two groups in defending this lawsuit: (1) Lisa Madigan, in her official capacity as Illinois Attorney General, the Office of the Illinois Attorney General, and the State of Illinois (the "Entity Defendants"); and (2) Lisa Madigan as an individual, Ann Spillane, Alan Rosen, Roger Flahaven, and Deborah Hagan (the "Individual Defendants"). Both sets of defendants move for summary judgment on all of Levin's claims [R. 178, 191]. For the reasons stated below, Defendants' motions for summary

judgment are granted in part and denied in part consistent with this opinion.

I.

A.

Harvey Levin, a 66-year-old male, began his employment as an Assistant Attorney General in the Office of the Illinois Attorney General (OIAG) on September 5, 2000. R. 183, 199, Defs.' Statement of Facts (DSOF)[1] ¶ 4; R. 228, Pl.'s Statement of Additional Facts (PSOF) ¶¶ 1-2. Levin was 55 years old at the time he was hired by the OIAG. DSOF ¶ 6. He had over thirty years of legal experience, primarily in the insurance defense field. DSOF ¶ 13. Levin was assigned to work in the Consumer Fraud Bureau in Chicago, which is one of the six bureaus within the Consumer Protection Division. DSOF ¶ 10. Assistant Attorneys General in the Consumer Fraud Bureau are generally responsible for investigating consumer complaints, filing cases when the investigations reveal that it is appropriate, handling their own litigation case load, and, for more experienced

---

[1] The Entity Defendants' statement of facts, R. 199, and the Individual Defendants' statement of facts, R. 183, are identical with the exception of paragraph 2, which relates solely to jurisdiction and venue. For convenience, the Court will cite to the Entity Defendants' statement of facts throughout this opinion, unless specified otherwise.

attorneys, participating in multi-state litigation and supervising junior attorneys. DSOF ¶ 11; Defs.' Exhs. R, NN. Because the Consumer Fraud Bureau receives approximately 33,000 complaints annually, AAGs assigned to the Bureau are expected to work productively and efficiently. DSOF ¶ 12. In addition to their litigation responsibilities, AAGs in Consumer Fraud Bureau also educate the public about consumer protection, draft legislative proposals and analyze consumer bills pending in the legislature, and recommend the OIAG's position on the bills. DSOF ¶ 11.

Before he was hired, Levin interviewed with the Deputy Attorney General for Civil Litigation, Roger Flahaven (44 years old), the Chief of the Consumer Protection Division, Patricia Kelly (55 years old), and the Chief of the Consumer Fraud Bureau, Charles "Gil" Fergus (53 years old).[2] DSOF ¶¶ 5, 6-9. Levin's certificate of appointment to the position of Assistant Attorney General is dated September 5, 2000, and was issued by former Illinois Attorney General James E. Ryan . DSOF ¶¶ 4, 77; Defs.' Exh. GG. Levin received a second certificate of appointment when Lisa Madigan replaced James Ryan as the Illinois Attorney General in January 2003. DSOF ¶¶ 41, 76; Defs.' Exh. FF.

---

[2] Levin admits interviewing with Flahaven and Kelly, but denies that Fergus interviewed him. PSOF ¶ 1.

On December 1, 2002, Levin was promoted to Senior Assistant Attorney General and received a salary raise. PSOF ¶ 2. He remained in the Consumer Fraud Bureau, with Fergus acting as his immediate supervisor for the duration of Levin's employment. PSOF ¶ 33. Nonetheless, the composition of the OIAG changed over the years Levin was employed there. In January 2003, Lisa Madigan was sworn in as the Attorney General for the State of Illinois and designated Ann Spillane as her Chief of Staff. Defs.' Exh. P ¶ 2. In September 2004, Deborah Hagan was selected as the new Chief of the Consumer Protection Division, replacing Patricia Kelly. PSOF ¶ 39; Pl.'s Exh. F at 5:5-9; Defs.' Exhs. U ¶ 4, N ¶ 31. The Chief of Consumer Protection supervises the operation of the Consumer Fraud Bureau. Defs.' Exh. U ¶ 5. Thus, Fergus began reporting directly to Hagan. Defs.' Exh. H ¶ 6. At the time of Levin's firing on May 12, 2006, Hagan reported to Roger Flahaven, the Deputy Attorney General for Civil Litigation. Defs.' Exh. U ¶ 29. Alan Rosen became Flahaven's supervisor after joining the OIAG as Madigan's Chief Deputy Attorney General on December 12, 2005. Defs.' Exh. AA ¶ 7. Rosen reported to Spillane who, in turn, reported to Attorney General Madigan. PSOF ¶ 42.

B.

Throughout Levin's employment, the OIAG required the job-performance evaluation of new attorneys at least

three months and fifteen days before the completion of their first six months of employment, and further evaluations at the completion of their first full year and once per year thereafter. PSOF ¶ 18. The OIAG based its salary raises on these annual, standardized performance evaluations. *Id.* Each non-supervisory employee, including Levin, was evaluated according to twelve categories: (1) preparation; (2) knowledge of law; (3) planning; (4) advocacy skills; (5) communication/negotiation skills; (6) work ethic/productivity; (7) initiative; (8) human relations; (9) judgment; (10) supervisory reporting; (11) professional responsibility; and (12) professional development. PSOF ¶ 19. In each category, attorneys were rated with the numbers 1 (needs improvement), 2 (meets expectations), or 3 (exceeds expectations). PSOF ¶ 19. "Exceeds expectations" meant that the attorney "exceeded overall performance objectives" and the attorney's overall performance was "clearly better than most individuals at this level." Pl.'s Exh. D-2. To achieve an "exceeds expectations" rating, the attorney was "highly skilled in the technical and managerial requirements of the job" and "made exceptional contributions in meeting difficult challenges." *Id.* A rating of 2, or "meets expectations," meant that the attorney "[h]as successfully achieved performance objectives" and "[m]ay have exceeded some objectives, but overall the individual has competently performed

the assigned duties." *Id.* This rating also "[d]emonstrates the [attorney's] motivation to improve performance." *Id.* Finally, the lowest rating of "needs improvement" signified that the attorney "[h]as not completely or consistently met performance objectives" and "[h]as not completely reached standards of quality and quantity for performance objectives." *Id.*

During Levin's employment at the OIAG, he was consistently evaluated as "meets expectations" or "exceeds expectations" in each of the twelve categories listed above. PSOF ¶ 20; Pl.'s Exhs. D-2 – D-7. His average scores across these twelve categories for each year of his employment were as follows:

Year	**Average Score**
2000	2.5
2001	2.83
2002	2.83
2003	2.6
2004	2.5
2005	2.5

Levin's evaluations were completed by his direct supervisor, Charles Fergus. DSOF ¶ 38. Although Levin's 2004-2005 evaluations were reviewed and

signed by Deborah Hagan, and his 2001-2003 evaluations were signed by Patricia Kelly, Fergus states that he completed Levin's evaluations without input from anybody else. See Pl.'s Exhs. D-2 – D-7; Defs.' Exh. H ¶ 55. Levin's early evaluations from 2000, 2001, and 2002 contain individual comments about his performance, all of which are positive. See Pl.'s Exhs. D-5 – D-7. For instance, in 2002, Fergus described Levin as "a top rate experienced litigator" who was "of great help to all in the Bureau." Pl.'s Exh. D-5. Levin exhibited "outstanding performance on the executive committees of the Firestone . . . multi state cases." *Id.* Similar comments were included on Levin's 2001 written evaluation: "Excellent attorney who is always willing to assist others in the Bureau. Has done an outstanding job on the executive committee for the Bridgestone/Firestone multistate." Pl.'s Exh. D-6. Finally, Levin's 2000 written evaluation, which graded his work during the first four months of employment, stated that Levin was "involved in several serious matters and doing an excellent job." Pl.'s Exh. D-7.

Levin's last evaluation was completed on December 7, 2005 – about five months before his termination. PSOF ¶ 23; Pl.'s Exh. D-2. In that evaluation, Levin was rated as "exceeds expectations" in the following categories: preparation, knowledge of law, advocacy skills, communication/negotiation skills, initiative, and judgment. *Id.* Levin was rated "meets expectations" in

all remaining categories: planning, work ethic/productivity, human relations, supervisory reporting, professional responsibility, and professional development. *Id.* Levin did not receive a "needs improvement" rating in any category. PSOF ¶ 24.

In an affidavit submitted in connection with Defendants' motions for summary judgment, Fergus claims that, contrary to Levin's positive employment evaluations, his performance left much to be desired. *See* Defs.' Exh. H. Fergus cites a number of specific incidents in support of his contention that Levin lacked the productivity and judgment expected of a Senior Assistant Attorney General with more than thirty years of legal experience. *Id.* ¶¶ 20-50. Fergus claims that these incidents were addressed with Levin at the time that they occurred, and Fergus therefore omitted these incidents from Levin's annual written evaluations. *Id.* ¶ 52. Fergus explains further that, when completing written evaluations, he tries to focus on the positive aspects of an attorney's performance. *Id.* ¶ 53. According to Fergus, Levin's positive evaluations reflected that Levin "had the necessary legal mechanics." *Id.* ¶ 54. However, Levin's declining average scores indicate that he "was not progressing as he should have been . . . [and] his performance did not meet the requirements of his senior title and his litigation approach did not meet the approach of the Office." *Id.*

C.

Defendants contend that there are numerous reasons for their decision to fire Levin. While Levin's written evaluations do not reflect these alleged problems, Defendants claim that Levin's unsatisfactory performance was discussed amongst his supervisors and brought to Levin's attention as well. DSOF ¶ 36.

1.

In particular, Defendants allege that Levin's productivity fell below the productivity of other attorneys in the Consumer Fraud Bureau. DSOF ¶ 14. Despite the significance that the OIAG places on resolving cases in the most efficient manner possible, Levin settled only two cases in 2005 – one of which was four years old. DSOF ¶¶ 15-16. Fergus and Hagan claim that Levin's record indicated that he was not resolving cases at the rate expected of him. DSOF ¶ 16. Moreover, from January 1, 2006 through May 12, 2006, Levin had no enforcement activity: he filed no lawsuits, nor did he obtain any settlements, judgments, or "assurances of voluntary compliance." DSOF ¶ 17. Levin disputes this alleged period of inactivity, and points to a lawsuit he filed against Ronald W. Kafka and Father & Sons Contractors, home repair contractors against whom the OIAG had received complaints over many years, on May 2, 2006. Pl.'s Exh. G ¶ 56, G-8; Defs.' Exh. H ¶ 45.

Fergus and Kelly claim that Levin's productivity was hampered by his focus on unnecessary minutia in his cases. DSOF ¶ 18. Additionally, Fergus, Kelly, Hagan, and Flahaven all blame Levin's allegedly low productivity on his excessive socializing in the Office. DSOF ¶ 19. In their affidavits, Fergus, Kelly, and Hagan make identical, general claims that they personally saw Levin walking around the halls, standing in other attorneys' offices, and standing in the offices of employees who were not in the Bureau on a frequent basis. DSOF ¶ 19. Spillane's affidavit describes similar behavior – specifically, that Levin would come to her office, which was about twenty-eight offices from his own office, or find Spillane in the hallway near her office to chat about matters that were not work related. Exh. P ¶ 19. The OIAG's Director of Attorney Recruitment and Professional Development, Ruta Stropus, also submitted an affidavit detailing how Levin would frequently come to her office – located about nineteen offices from his – to chat. Exh. W ¶ 21. At least one of Levin's co-workers in the Consumer Fraud Bureau confirms these accounts. Assistant Attorney General Katrina Wanzer-Derhake asserts that Levin would frequently come to her office to talk about topics unrelated to work, including his vacations and other personal matters. Defs.' Exh. V ¶ 4. Wanzer-Derhake claims further that when the topic turned to work, Levin would regale her with unwanted war stories about his past cases. *Id.* ¶ 4. She also observed Levin standing

in the offices of other attorneys, and there were instances where attorneys complained to Wanzer-Derhake about Levin's frequent social visits. *Id.* ¶¶ 6-7. Fergus, Kelly, and Hagan state that junior attorneys, including Wanzer-Derhake, Steve Mange, and Sarah Alipourian, reported that they were uncomfortable with how much time Levin would spend in their offices. Defs.' Exhs. H ¶¶ 28-30; U ¶¶ 16-18; N ¶¶ 16-17.

Levin denies all of these allegations. See Pl.'s Exh. G. He claims that he did not get mired in minutia on his cases, nor did he spend an excessive amount of time socializing with others in the Office. *Id.* ¶¶ 25, 32-33.

2.

Defendants also claim that they were not satisfied with the way Levin handled the few cases that were assigned to him. Specifically, Defendants found it problematic that Levin oftentimes took extreme positions in multi-state litigation cases without first discussing the issue with his supervisors. DSOF ¶ 27. Hagan states that she received complaints from Assistant Attorneys General in other states about Levin's insistence that the OIAG would not agree to a certain position or certain terms when, in fact, the OIAG had not made a decision about such positions or terms. Defs.' Exh. U ¶¶ 24-27. Fergus claims that this

problem continued, despite his efforts to counsel Levin about the importance of keeping his supervisors informed about all multi-state litigation and refraining from taking positions without the Office's approval. Defs.' Exh. H ¶¶ 38-41.

According to Defendants, Levin required more supervision than should have been necessary for his years of legal experience. *Id.* ¶ 44. For instance, with respect to the home repair contractors lawsuit Levin filed in May 2006, Fergus recounts how Levin struggled to come up with a sufficient complaint. *Id.* ¶ 46. Levin's "drafts were sparse" and Fergus spent a lot of time helping Levin put together the complaint. *Id.* Hagan also claims that she witnessed Levin struggle as an attorney. Defs.' Exh. U ¶ 28. She alleges that Levin mishandled the settlement of a multi-state case involving Direct TV. *Id.* The OIAG had recently settled a very similar case, yet Levin failed to provide the settlement documents to the multi-state group. *Id.* Hagan was disappointed that Levin overlooked the importance of consistency and did not seem to have a good grasp on the issues in the settlement. *Id.*

Again, Levin denies these allegations. Pl.'s Exh. G ¶¶ 34-38.

3.

Defendants also cite various other reasons for their decision to fire Levin. In addition to his low productivity and inferior litigation skills, Defendants allege Levin exercised poor judgment on a number of other occasions. For instance, when a new attorney joined the OIAG in 2004 or 2005, Levin allegedly made an inappropriate comment about Katrina Wanzer-Derhake's fashion and/or shopping habits.[3] Levin admits that he made a comment, but that Wanzer-Derhake told him she was not offended and was proud of her fashion expertise. Pl.'s Exh. G ¶ 30. Levin claims Fergus and Hagan never talked to him about this incident. *Id.* ¶ 31. In contrast, Wanzer-Derhake states that Levin's comment "embarrassed [her] in front of the new attorney and . . . demeaned her professionally." Defs.' Exh. V ¶ 10. After female attorneys complained about the nature of the comment, Fergus and Hagan contend that they spoke to Levin about the comment and he agreed that it was inappropriate. Defs.' Exhs. H ¶ 50, U ¶ 23.

---

[3] The timing of the comment is in dispute. Levin states that "there was a comment about Katrina [Wanzer Derhake's] fashion expertise" when Henry Ford was hired in September 2004. Pl's Ex. G ¶ 30. Defendants claim that the comment was made in the fall of 2005, when Christine Nielsen was hired. DSOF ¶ 24; Defs' Exh. V ¶ 9.

Defendants contend that Levin exhibited poor judgment and human relations skills when he repeatedly approached Alan Rosen, the Chief Deputy Attorney General, outside of the office. Defs.' Exh. AA ¶¶ 8-12. According to Rosen, a man from the OIAG – whom he later identified as Levin (after the decision to fire Levin was made) – approached him several times when he was walking home from the Office. *Id.* ¶¶ 8-9. This man would tell lengthy stories about his prior legal experiences and his work and views with respect to the OIAG. *Id.* ¶ 10. Rosen believed the man was overexaggerating his role with the OIAG, and his narratives were "awkward and reflect[ed] poorly on himself." *Id.* ¶ 11. Rosen states that he would alter his route home from the office to avoid this person. *Id.* After the decision was made to fire Levin, Rosen was one of the attorneys present to inform him of his firing. *Id.* ¶¶ 17-18. At that meeting, Rosen recognized Levin as the person who had approached him several times during his walk home from work. *Id.* ¶ 20. Levin admits only that he and Rosen talked while walking home from work on one occasion. Pl.'s Exh. G ¶ 53.

Defendants point to another example of alleged poor judgment. During his tenure as an Assistant Attorney General in the Consumer Fraud Bureau, Levin and/or his wife filed multiple personal consumer fraud complaints with the Bureau. Defs.' Exh. H ¶ 47; Pl.'s Exh. G ¶¶ 49-50. For example, in March 2003, Levin

filed a consumer fraud complaint against his dentist alleging that he was over-billed for some dental work. DSOF ¶ 32; Defs.' Exh. X. The dentist, through his legal counsel, contacted the OIAG regarding Levin's alleged representations that he would use his position in the Consumer Fraud Bureau to prove that the dentist had committed consumer fraud. DSOF ¶ 33; Defs.' Exh. X. In a memorandum to Patricia Kelly dated March 27, 2003, Levin denied suggesting that the OIAG would act specially on his behalf to prosecute the dentist. Defs.' Exh. X. But he did acknowledge "that [he] should not have ever mentioned [the OIAG] as the basis of [his] experience. It was imprudent and a mistake in judgment." *Id.* Defendants put forth this evidence as demonstrative of their concern with Levin's judgment and ability to appropriately represent the OIAG. See R. 180 at 4.

D.

In early 2006, the OIAG embarked on its annual process of conducting performance reviews of all attorneys in the Office. DSOF ¶ 43. At this point, Ann Spillane had served as Attorney General Madigan's Chief of Staff for three years and felt comfortable enough with her acquired knowledge of the Office and its attorneys to begin having more detailed discussions with the senior staff about attorneys who were potentially underperforming. DSOF ¶ 42; Defs.' Exh. P

¶ 14. In particular, Attorney General Madigan's emphasis on consumer protection issues had prompted Spillane to routinely review and discuss the status of consumer protection cases with Flahaven, Hagan, and Fergus. DSOF ¶ 48. Thus, over time, Spillane learned more about the attorneys in the Consumer Fraud Bureau and their level of performance. DSOF ¶ 48. At the outset of the 2006 review, Alan Rosen, who was new to the Office and participating in the annual performance review process for the first time, suggested that the OIAG take job actions with respect to attorneys that were identified as underperforming. DSOF ¶ 44.

On May 10 or 11, 2006, Spillane determined that Levin was underperforming and decided to terminate his employment. DSOF ¶ 63; Defs.' Exh. M at 41. She based her decision on the information she gathered from Levin's supervisors during the 2006 annual review process, as well as her own personal impressions of Levin. DSOF ¶¶ 62, 64; Defs.' Exh. P ¶ 18; PSOF ¶ 71. Spillane also reviewed a printout of the names, salaries, and last evaluation scores of all attorneys on the OIAG's budget before making her decision. PSOF ¶ 74. This list may also have included the attorneys' law school graduation dates.[4] PSOF ¶ 74; Pl.'s Exh. B at 42. On or before May 12, 2006, Spillane informed Attorney General Madigan that she planned to fire twelve

---

[4] Copies of this printout no longer exist. *See infra* at [83a].

attorneys, and may have shared the names of those attorneys with Madigan. DSOF ¶ 66. On May 12, 2006, Flahaven and Rosen met with Levin and informed him that he had been fired.

E.

Levin was not the only attorney fired by Defendants in May 2006. There were eleven other attorneys who were also fired for performance issues. PSOF ¶ 60; DSOF ¶ 65. Two of these attorneys were Nicholas Rantis and Stanley Wojciechowski – both of whom worked in the Consumer Fraud Bureau with Levin. And, like Levin, Rantis and Wojciechowski were males over the age of 40 at the time they were terminated. PSOF ¶¶ 27-28. Levin and Rantis were both replaced by female attorneys in their thirties. PSOF ¶¶ 88, 92. Wojciechowski's replacement was a twenty-nine-year-old male. PSOF ¶ 95. Defendants dispute that these new hires "replaced" Levin, Rantis, and Wojciechowski because the new hires did not take over any of the three attorneys' cases or work. Rather, Defendants claim that the term "replaced" refers only to head count. R. 240, Defs.' Resp. PSOF ¶¶ 88, 92.

II.

The summary judgment motion was fully briefed on

March 9, 2010. R. 238-39. The district judge previously assigned to this case issued an opinion regarding Defendants' motions to dismiss, R. 33, 36, 58, on March 10, 2010, the day after completion of the briefing on the summary judgment motion. R. 244-45. That opinion resolved some of the issues raised in the parties' summary judgment briefs. For instance, Entity Defendants' motion to dismiss the State of Illinois and Lisa Madigan, in her official capacity, as defendants under Counts 1 and 2 was granted. R. 245 at 21-22. The Court also dismissed Levin's claim for emotional damages in Counts 1 and 2, as well as any claims Levin had for monetary damages or indemnification from the Entity Defendants under Counts 3 and 4. R. 245 at 23-24. However, the Court found that Levin's claim for injunctive relief against the Entity Defendants in Counts 3 and 4 survived because in the event Levin's employment is reinstated, an injunction requiring Defendants to cease engaging in sex or age discrimination would remedy a harm that he is likely to suffer again. R. 245 at 24-25.

Turning to the Individual Defendants' motion to dismiss, Levin's claims for injunctive relief against the Individual Defendants in Counts 3 and 4 were dismissed because "section 1983 does not permit injunctive relief against state officials sued in their individual as distinct from their official capacity." *Greenawalt v. Ind. Dep't of*

Corr., 397 F.3d 587 (7th Cir. 2005). The Court rejected the Individual Defendants' argument that the ADEA provides the exclusive federal remedy for age discrimination, and denied their motion to dismiss Count 4. R. 245 at 12-19. This Court does not disturb these rulings.

However, in addition to addressing the merits of the case, there are two issues the Court will re-visit in the instant summary judgment opinion. First, the Court agrees with the Entity Defendants' position that Levin is not an "employee" covered by Title VII or the ADEA; there is now a fuller record upon which to analyze the argument, and the record shows that Levin is not an "employee" for those purposes.[5] See R. 180 at 5-8. Therefore, for the reasons discussed further below, the Court grants Defendants' motion for summary judgment with respect to Counts 1 and 2. Second, the

---

[5] This holding conflicts with the decisions issued by the previously assigned district judge. See R. 55, 245. While the previous judge found that Levin's position of Senior Assistant Attorney General was indeed "on the policy making level," he held that the exemption was barred because Levin was not "appointed" by the Illinois Attorney General. R. 55 at 6-9; R. 245 at 7-9. As discussed further below, this Court agrees with the first part of the previous judge's analysis, but concludes – based on additional materials not presented to the previous judge –that Levin was indeed an "appointee" and falls within the exemption to employee status under Title VII and the ADEA.

Court finds that the Individual Defendants are not entitled to qualified immunity with respect to the alleged age discrimination in violation of the equal protection clause (Count 4). As explained below, the Defendants' motion for summary judgment is denied as to Levin's § 1983 claims. When the evidence is viewed in the light most favorable to Levin, his claims present genuine issues of material fact that cannot be resolved as a matter of law on summary judgment. Thus, Counts 3 and 4 survive against Ann Spillane, Alan Rosen, Roger Flahaven, Deborah Hagan, and the Office of the Illinois Attorney General.

III.

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All facts, and any inferences to be drawn from them, must be viewed in the light most favorable to the non-moving party. *Wis. Cent. Ltd. v. Shannon*, 539 F.3d 751, 756 (7th Cir. 2008). The evidence presented at this stage must

comport with the Federal Rules of Evidence and be admissible at trial, *United States v. 5443 Suffield Terrance, Skokie, Ill.*, 607 F.3d 504, 510 (7th Cir. 2010), or it must consist of affidavits or declarations "made on personal knowledge, set[ting] out facts that would be admissible in evidence, and show[ing] that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The court does not assess the credibility of witnesses or weigh evidence, *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005), and will not grant summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

IV.

A.

To bring an action for alleged unlawful employment actions under Title VII and the ADEA, the plaintiff must be an "employee" as that term is defined by those statutes. The relevant sections of both statutes that define the term "employee" read:

> The term 'employee' means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the

> qualified voters thereof, or anyperson chosen by such officer to be on such officer's personal staff, or any appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

42 U.S.C. § 2000e(f); 29 U.S.C. § 630(f). Title VII and the ADEA thus exclude from their "coverage four types of persons: (1) elected officials; (2) the personal staff of an elected official; (3) appointees on the policymaking level; and (4) 'an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.'" *Opp v. Office of the State's Attorney of Cook Cnty.*, 630 F.3d 616, 619 (7th Cir. 2010). Defendants argue that Levin is situated within the third exception as an appointee on the policymaking level. See R. 180 at 5-9. The Court agrees.

The Seventh Circuit's "case law regarding the interpretation of an appointee on the policy making level is well-established. An individual is considered an appointee on the policymaking level if 'the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation.'" *Opp*, 630 F.3d at 619 (quoting *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996)).

To determine whether the individual was, in fact, "appointed" to the position, the court looks to statutes that relate to the position. *See Opp*, 630 F.3d at 621-22; *Americanos*, 74 F.3d at 143; *Bervid v. Alvarez*, 647 F. Supp. 2d 1006, 1011-12 (N.D. Ill. 2009) (the position of Assistant States Attorney is a "creature of state statute," and that statute provides that plaintiff was both appointed by and accountable to an elected official). However, the Seventh Circuit has not had occasion to define the exact parameters of what it means to be an "appointee" for purposes of the Title VII and ADEA exemptions because in all of the cases before it, the law clearly stated that the plaintiff was appointed by a public official. See *Bervid*, 647 F. Supp. 2d at 1010-12.

As noted, supra at [57a] n.5, the previously assigned judge, using the evidence available to him at the motion to dismiss stage, determined that Levin was not an "appointee on the policy making level." R. 55 at 6-9 (emphasis added). Specifically, the Court ruled that Levin "was not appointed by the Attorney General herself, but by the Chief of Consumer Protection with the approval of the Deputy Attorney General for Civil Litigation." R. 55 at 7. The Court interpreted 42 U.S.C. § 2000e(f) and 29 U.S.C. § 630(f) to require that an individual be directly appointed "by an elected official because the language regarding appointees was placed in a statute principally concerned with exempting

elected officials." R. 55 at 8 (*quoting O'Neill v. Ind. Comm'n on Pub. Records*, 149 F. Supp. 2d 582, 589 (S.D. Ind. 2001)). Thus, the Court concluded that Levin "was 'appointed' by the individuals who hired him, not by the Attorney Generals whose names formally appear on his certificates of appointment." R. 245 at 7-8 (denying Defendants' motion to reconsider the Court's decision, R. 55).

In his brief opposing summary judgment, Levin maintains that he was not appointed by the Attorney General, as former Illinois Attorney General James Ryan was not personally involved in the decision to hire or appoint Levin. *See* R. 226 at 24. Defendants re-assert their position, with accompanying evidence, that Levin was appointed by former Attorney General James Ryan on September 5, 2000, as evidenced by the Certificate of Appointment Levin received and the statements he signed acknowledging his appointment. See R. 180 at 5-8. Also, for the first time, Defendants point to a provision in the Illinois Administrative Code that states that "[t]he Attorney General appoints Assistant Attorneys General, who are assigned either to the Springfield or the Chicago office . . . Assistants are responsible to a designated chief." R. 180 at 6-7 (citing 2 Ill. Adm. Code § 575.260). Defendants state that they were unaware of this code provision at the time their motion to dismiss was initially briefed, R. 33, or decided, R. 55. See R. 180 at 7 n.4.

The Seventh Circuit has not expressly considered whether Assistant Attorneys General in Illinois are "appointed" by the Attorney General, thereby excluding them from Title VII and ADEA coverage. However, in an analogous line of cases, the Seventh Circuit has held that "all Assistant State's Attorneys are appointees on the policymaking level and therefore are not within the coverage of the ADEA." *Opp*, 630 F.3d at 619. In Opp, the plaintiffs argued "that they were not 'named' or 'appointed' by the State's Attorney, as they were hired by the State's Attorney's Office instead, and in any case, they were hired as Assistant State's Attorneys before Richard Devine was elected as the Cook County State's Attorney." *Id.* at 621-22. The Court of Appeals found this argument without merit on all accounts. First, under Illinois law, "Assistant State's Attorneys are to be named by the State's Attorney of the county." *Id.* at 622 (quoting 55 ILCS 5/4-2003)). "This statutory language gives the State's Attorney exclusive authority to appoint Assistant State's Attorneys. This statute makes plain that Assistant State's Attorneys are appointees." *Id.* Moreover, plaintiffs' argument that they were not "chosen by" Richard Devine failed because "[e]ach current Assistant State's Attorney is re-appointed upon the swearing in of each new State's Attorney. The [plaintiffs] were thus appointed by Richard Devine upon his swearing in." *Id.*

Here, Illinois law provides that "[t]he Attorney General appoints Assistant Attorneys General." *See* 2 Ill. Adm. Code § 575.260;[6] *see also People v. Scates*, 914 N.E.2d 243, 245 (Ill. App. Ct. 2009) (section 575.260 "clearly provides for the appointment of Assistant Attorneys General"). Thus, "an Assistant Attorney General is appointed to an office established by statute." *Scates*, 914 N.E.2d at 246 (finding the administrative rule codified at § 575.260 valid because it does not conflict with the Attorney General Act, 15 ILCS 205/0.01 through 7). As an Assistant Attorney General, Levin was accountable to the Attorney General, who, like the State's Attorney, is an elected official. As with Assistant State's Attorneys, Illinois law compels the conclusion that Levin was appointed by the Attorney General. Levin fails to cite any authority supporting a different result. Levin argues that he was not "appointed" because former Attorney General James Ryan did not personally choose him for the position, yet the Seventh Circuit has never interpreted the statutory exemption to require such direct involvement. Indeed, as the previously-assigned judge noted, "[t]he Seventh

---

[6] Illinois law vests the Attorney General with rule-making authority. *See People v. Scates*, 914 N.E.2d 243, 245 (Ill. App. Ct. 2009) (citing 5 ILCS 100/1-70, 1-90). "The rules made by the Attorney General are promulgated in the Illinois Administrative Code. Like statutes, administrative rules have the force and effect of law and are presumed valid." *Id.* (internal citations omitted).

Circuit has not addressed the issue of whether an individual must actually be appointed by an elected official directly in order to be an 'appointee on the policy making level.'" R. 55 at 7 (emphasis added). Again using *Opp* as a guide, this Court has no reason to believe that Richard Devine personally interviewed each and every Assistant State's Attorney before officially appointing them to their positions pursuant to Illinois law. Thus, the fact that former Attorney General Ryan did not personally interview or select Levin does not distinguish this case from *Opp*.

Upon being appointed an Assistant Attorney General, Levin held a policymaking position in the Illinois Attorney General's Office. In opposing summary judgment, Levin does not argue that he was not a policymaker as defined in *Americanos*. *See* R.226 at 23-25. That argument was rejected by the previous judge in his opinion denying Defendants' first motion to dismiss. R. 55 at 4-6. The prior judge found that, as a matter of law, Levin occupied a policymaking position because his job description "suggests that [Levin] could potentially influence policy making by providing his supervisors with research and opinions or by appearing on behalf of the Attorney General." R. 55 at 6. This Court agrees that Levin's position as an Assistant Attorney General gave him inherent policymaking authority.

In making this determination, "a court is to examine 'the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office . . . [The Seventh Circuit] emphasize[s] the functions of the office involved, not the officeholder.'" *Opp*, 630 F.3d at 620 (quoting *Tomczak v. City of Chicago*, 765 F.2d 633, 640-41 (7th Cir. 1985)). A plaintiff's "actual duties are irrelevant." *Id.* at 621. In *Americanos*, the Seventh Circuit held that the plaintiff, an Indiana Deputy Attorney General, had the "the direct ability to implement the policies and goals of the AG for the State of Indiana." 74 F.3d at 143. The statutory scheme governing the Office of the Indiana Attorney General "recognized that each DAG may be authorized to 'perform in behalf of . . . the state any and all of the rights, powers or duties now or hereafter conferred by law or laws upon the attorney general.'" *Id.* at 141 (quoting Ind. Code Ann. § 4-6-5-1)). Thus, a DAG in Indiana could potentially be called upon to perform any of the enumerated duties of the AG, such as "prosecuting and defending suits by or against the state and state officers, defending suits against state governmental officials or employees or teachers, advising state agencies, [and] collecting outstanding debts owed to the state." *Id.* The fact that the plaintiff was not the ultimate decision-maker does not discount the "meaningful input into governmental decision-making" he had when advising "his superiors concerning what his research on [issues and questions

involving politics and policy making where there is room for principled disagreement] revealed, and what he thought would be the correct course of legal action." *Id.* at 141-42; *see also Opp*, 630 F.3d at 621 (Assistant State's Attorneys do not merely implement policy actions on behalf of the State's Attorney; they carry out policy on behalf of the government, and in doing so have "meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation").

Like the plaintiffs in *Americanos* and *Opp*, Levin could be called upon to perform the duties of the Illinois Attorney General. The Attorney General's duties are numerous and generally include (1) prosecuting all actions and proceedings in favor of the State; (2) defending all actions and proceedings against any State officer, in his official capacity, in any of the courts of this State or the United States; (3) advising the State's Attorneys in matters relating to the duties of their office; (4) investigating alleged violations of the statutes which the Attorney General has a duty to enforce; (5) advising the governor and other State Officers; and (6) giving written opinions upon constitutional or legal questions. *See* 15 ILCS 205/4 (West 2010). Because the Attorney General cannot give personal attention to each duty, "[h]e must, and does, have power to appoint the necessary deputies or assistants to aid in carrying out those duties." *Saxby v. Sonnemann*, 149 N.E. 526, 529

(Ill. 1925). As a representative of the Attorney General, Levin's position meets the standard for policy making positions set forth in *Americanos*. As an appointee to a policy-making position, as a matter of law, Levin is not an "employee" covered by the scope of Title VII or by the ADEA. Summary judgment is entered for Defendants on Counts 1 and 2.

B.

1.

Levin also brought § 1983 claims parallel to his Title VII and ADEA claims, against the Individual Defendants and the OIAG for age and gender discrimination. The previously-assigned district judge dismissed Levin's § 1983 claim for age discrimination (Count 4) against the Individual Defendants based on the doctrine of qualified immunity. R. 245 at 20. The doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815 (2009). Put another

way, the general purpose of qualified immunity is "to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

In this case, the previous judge held that the Individual Defendants were entitled to qualified immunity – but not because it was unclear that the alleged age discrimination was prohibited by the Equal Protection Clause. Indeed, it is clearly established that the Fourteenth Amendment forbids arbitrary age discrimination under a rational basis test. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000). To be sure, this is not an exacting level of scrutiny, and the government may rely on age as a proxy for other characteristics. *Id.* at 88. But despite the relatively light level of scrutiny, irrational age discrimination is clearly forbidden by the Equal Protection Clause. In light of this clarity, the previous judge did not hold that the contours of equal protection were unclear, as a substantive matter, in applying to the alleged age discrimination.

But the Individual Defendants also argued that the enactment of the ADEA precluded government employees from resorting to § 1983 for an age discrimination claim; in other words, the ADEA is the

exclusive remedy for age discrimination claims. The judge rejected that argument (and this Court will not disturb that ruling), R. 245 at 13-19, and held that the ADEA does not preclude a § 1983 suit for age discrimination. The judge went on to hold, however, that because it was unclear whether the ADEA was the exclusive age-discrimination remedy, the Individual Defendants were entitled to qualified immunity, R. 245 at 20.

This Court sought further briefing on the application of the qualified immunity doctrine to procedural, rather than substantive, uncertainty. R. 256.[7] When determining whether qualified immunity applies to protect a defendant, the question is whether a reasonable official would have known that the official was violating a clearly established constitutional right, which is a substantive question, not a question concerning whether a particular procedural vehicle (*i.e.*,

---

[7] The Court understands that the law of the case doctrine applies where a case is reassigned to a different judge. *Brengettcy v. Horton*, 423 F.3d 674, 680 (7th Cir. 2005). But if the issue presented is not presented in "precisely the same way" as it was to the prior judge, then there is less force to the law of the case doctrine, *Id.*, and here the previous briefing did not directly address whether the qualified immunity doctrine could ever apply to procedural uncertainty as to the proper cause of action.

cause of action) is available. *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989) ("As we have said many times, § 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred.") (quotations and citations omitted). The qualified-immunity analysis, with its focus on whether it was reasonably clear that the official's conduct violated a constitutional right, is a poor fit for determining whether one cause of action or another is the appropriate one upon which to base a lawsuit against that otherwise clearly prohibited conduct. It is especially odd to apply qualified immunity in the context where the procedural uncertainty arises from the fact that Congress created a statutory remedy for age discrimination that is substantively broader than the equal protection clause. *See Kimel*, 528 U.S. at 88. Had Congress not enacted the ADEA, then it would be clear, of course, that § 1983 is the procedural vehicle by which to bring an age-discrimination claim, and there would be no occasion to apply qualified immunity (so long as one accepts that irrational age discrimination is a clearly cognizable claim) on the grounds of procedural uncertainty. There would thus be an irony in accepting Defendants' argument: Congress supplied even greater protection, generally speaking,[8] against age

---

[8] The greater protection does not apply across the board, as demonstrated both by this case (because Plaintiff is not an "employee" protected by the ADEA) and, more broadly, by (continued...)

discrimination than the Equal Protection Clause, and yet accepting Defendants' argument would result in qualified immunity from § 1983 age-discrimination claims until the controlling Court of Appeals or the Supreme Court addressed the proper procedural-vehicle issue, if it ever did. Applying qualified immunity in this context is far afield from serving the purpose of the doctrine: to permit officials to reasonably anticipate when their conduct violates a constitutional right.

Moreover, in a recent case where the Supreme Court held that a federal statute does not preclude a § 1983 action to bring a constitutional claim (as the previous judge held in this case), the Supreme Court decided and remanded the case without asking whether qualified immunity applies. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009) (remanding for evaluation of the merits of the constitutional claim with no hint that qualified immunity was an issue to consider). It is true that the question of qualified immunity did not appear to be presented to the Supreme Court. But it is noteworthy that, when the Supreme Court rejected an argument that a federal statute precluded a § 1983 remedy, there was no mention of qualified immunity,

---

[8] (...continued)
Kimel (because the Supreme Court ultimately concluded that the ADEA was not a valid exercise of § 5 authority to abrogate state sovereign immunity with regard to monetary damages claims).

which would have obviated the question of money damages.[9]

Based on the reasons discussed above, the Court concludes that qualified immunity does not apply to the § 1983 age-discrimination claim. As a substantive matter, Levin faces a higher hurdle in proving actionable age discrimination under the Equal Protection Clause than under the ADEA. *Kimel* permits treating a person differently based on age so long as the treatment is based on a legitimate purpose achieved by a rational means. 528 U.S. at 84. As detailed below, however, Defendants maintain that they did not treat Levin differently on the basis of age. Defendants have instead argued that Levin was fired for reasons other than his age. The record evidence is discussed in the next section.[10]

---

[9] The Supreme Court (and the lower federal courts) may address the question of qualified immunity rather than addressing the merits of the underlying constitutional claim. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 819-21 (2009).

[10] It is worth noting that even if qualified immunity applied to the § 1983 age-discrimination claim for monetary damages, the claim for injunctive relief would survive; additionally, the sex-discrimination claim also survives, as discussed *infra*.

2.

In determining whether Levin's equal protection claim for age discrimination will proceed to trial, the Court again emphasizes that the facts at this stage are viewed in the light most favorable to Levin, and reasonable inferences must be drawn in his favor – for now. To survive summary judgment, a plaintiff alleging an equal protection violation under § 1983 must establish that he has been the victim of intentional discrimination using either the direct or indirect method of proof. *See Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1036-38 (7th Cir. 2003). Levin pursues both methods of proof in this case.

a.

To succeed under the direct method, Levin "must offer either direct evidence that would prove the fact in question – the discriminatory intent – without reliance on inference or presumption, or a 'convincing mosaic' of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *See Silverman v. Bd. of Educ. of City of Chicago*, 637 F.3d 729, 734 (7th Cir. 2011) (internal citations omitted); *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1118 (7th Cir. 2009) ("Under the direct method, the inference that the employer acted based on the prohibited animus has to be substantially strong."). Levin relies on the latter

approach, and, therefore, may present any of three broad types of circumstantial evidence: (1) evidence of suspicious timing, ambiguous statements, behavior toward or comments directed at other employees over the age of 40, and other bits and pieces from which an inference of discriminatory intent might be drawn; (2) evidence showing that the employer systematically treated other, similarly situated employees under 40 years old better; and (3) evidence that Levin suffered an adverse employment action and that the employer's justification is pretextual. *Silverman*, 637 F.3d at 734 (citations omitted). "Whatever circumstantial evidence is offered, however, must 'point directly to a discriminatory reason for the employer's action.'" *Van Antwerp v. City of Peoria*, 627 F.3d 295, 298 (7th Cir. 2010) (quoting *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003)). Pursuant to the direct method, Levin offers circumstantial evidence of types one and two.[11] The Court considers all of Levin's circumstantial evidence to determine whether, taken

---

[11] The "third type of evidence is substantially the same as the evidence required to prove discrimination under the indirect method," so the Court addresses Levin's attempt to show pretext later in the opinion, *see infra* at [87a-92a]. *Silverman*, 637 F.3d at 734; *Venturelli v. ARC Cmty. Servs., Inc.*, 350 F.3d 592, 601 (7th Cir. 2003) (explaining that the "pretext" category of circumstantial evidence under the direct method is substantially the same as the evidence required under the indirect method).

collectively, the evidence constructs a "convincing mosaic" that would allow a jury to infer intentional discrimination. *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (noting that each type of circumstantial evidence can be used on its own or together with other types of circumstantial evidence to establish discrimination).

Levin's primary argument relies on statistical evidence which he claims shows that Defendants intentionally discriminated against him based on age and gender. Levin argues that the Consumer Protection Division's hiring and promotion statistics show that Defendants prefer to hire and promote young females. R. 226 at 17. Levin claims that Spillane "has hired more than double the number of female attorneys to work in the Consumer Protection Division" since she became Chief of Staff in 2003. PSOF ¶ 44. Specifically, Spillane has hired 23 female attorneys and 10 males, and 31 of the 33 new hires were more than 10 years younger than Levin. PSOF ¶ 44. Defendants argue that Levin's use of statistics is improper. R. 239 at 13-14. For example, they claim that Levin's statistics do not provide any information as to the application pool or other background evidence. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (discussing statistical evidence in a reduction-in-force employment action). Defendants state that any increased hiring in favor of women, or younger attorneys, is due to the fact

that the OIAG receives more applications from female attorneys and younger attorneys. At their depositions, Spillane and Hagan testified that they receive more applications from women than men. Defs.' Exhs. M at 222-23, Q at 182-83. The OIAG database also shows that most applicants are recent law school graduates and, thus, the Consumer Protection Division receives more applications from junior attorneys. Defs.' Exh. W ¶¶ 14, 17.

Defendants arguments are well-taken. "Statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of discrimination." *Radue*, 219 F.2d at 616-17 (quotation omitted). And Levin's failure to show the baseline – the applicant pool – against which the hiring statistics should be measured renders his numbers meaningless. *See Hemsworth v. Quotesmith.com*, 476 F.3d 487, 492 (7th Cir. 2007) (rejecting plaintiff's proposed statistical evidence where it lacked "the necessary context for meaningful comparison"); *Ibarra v. Martin*, 143 F.3d 286, 291 (7th Cir. 1998). Moreover, the fact that Levin, Rantis, and Wojciechowski – all males over the age of 40 – were three of the four attorneys fired from the Consumer Fraud Bureau in May 2006 does not, by itself, constitute circumstantial evidence that Levin was terminated because of his age. Statistical evidence "can only show a relationship between an employer's decisions and the affected

employees' traits; [it does] not show causation." *Radue*, 219 F.2d at 616. Additionally, as with the hiring statistics, the Court does not consider these numbers in a vacuum. Levin, Rantis, and Wojciechowski were three of twelve attorneys fired on May 12, 2006. DSOF ¶ 65. Four of the terminated attorneys were under the age of 40, and eight, including Rantis, were "substantially younger" than Levin. See Defs.' Exh. CC ¶ 4. Thus, the majority of the attorneys who were fired in May 2006 were substantially younger than Levin. In view of the circumstances, the fact that Levin, Rantis, and Wojciechowski were fired and later replaced with substantially younger attorneys does not raise a strong suspicion of age discrimination.[12]

Levin attempts to bolster his statistics argument with evidence that substantially younger employees similarly situated to Levin received better treatment from Defendants. R. 226 at 17-18. However, as Defendants point out, "[a]n employee is similarly situated to a plaintiff if the two employees deal with the same supervisor, are subject to the same standards, and

---

[12] Indeed, to be clear, the incompleteness of Levin's statistical analysis renders the evidence of other hirings and firings irrelevant. And even if there were any relevancy to the evidence, so much more additional evidence (dissecting each of the hirings and firings) would be required to avoid misleading the jury that Rule 403 would prevent its admission.

have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 538 (7th Cir. 2007). As the Seventh Circuit instructs, "the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination." *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007), *aff'd on other grounds*, 553 U.S. 442 (2008). It "is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees – distinctions can always be found in . . . performance histories or the nature of the alleged transgressions." *Id.* at 405. Rather, the purpose of the similarly-situated test "is to determine whether there are enough common factors between a plaintiff and a comparator – and a few enough confounding ones – to allow for a meaningful comparison in order to divine whether discrimination was at play." *Barricks v. Eli Lilly & Co.*, 481 F.3d 556, 560 (7th Cir. 2007).

Here, Levin argues that he was similarly situated to thirty-five attorneys in the Consumer Protection Division who were "substantially younger" than him as of May 12, 2006, and were not fired by Defendants. PSOF ¶ 80. Levin contends that he was similarly

situated to these thirty-five attorneys because they (1) had the ability to and did each other's tasks, (2) shared Deborah Hagan as the division chief, and (3) were subject to the same annual standardized written performance evaluation. PSOF ¶ 80. However, a closer look at Levin's comparison group reveals that these attorneys are not comparable to Levin "in all material respects," thus precluding a meaningful comparison. *See Henry v. Jones*, 507 F.3d 558, 564 (7th Cir. 2007).

First, the Court notes that two of the attorneys included in Levin's proposed group are neither female nor "substantially younger" than Levin, who was 61 years old at the time he was terminated.[13] PSOF ¶ 80. Thus, they are easily removed as potential comparators because they do not fall outside of the relevant protected classes. Also, nearly half of the attorneys remaining in Levin's proposed group were not assigned to the Consumer Fraud Bureau in Chicago. See Defs.' Resp. to PSOF ¶¶ 80-81. These attorneys are not comparable. The Court agrees with Defendants' argument that the relevant comparable field is the Consumer Fraud Bureau in Chicago. As part of the Consumer Fraud Bureau, Levin reported directly to the Bureau Chief, Charles Fergus. Fergus was Levin's

---

[13] William Reif (male, 52 years old) and Matthew Shapiro (male, 52 years old). PSOF ¶80(x) and (cc).

immediate supervisor, and responsible for completing annual written performance evaluations for Levin and the other attorneys in the Chicago office of the Consumer Fraud Bureau. The fact that the various bureaus within the Consumer Protection Division used the same performance evaluation forms does not mean that they were subject to the same standards or answered to the same supervisor. *See Bio v. Federal Express*, 424 F.3d 593, 597 (7th Cir. 2005). Levin fails to explain why it is appropriate to compare him to attorneys in other Bureaus such as Charitable Trusts, Franchise, Health Care, or Veterans Rights.

Levin also ignores the different titles and levels of responsibility occupied by attorneys in the Consumer Protection Division. He claims that the title of "senior or supervising attorney" has nothing to do with that attorney's job duties, performance standards, or salary. PSOF ¶ 87. However, he has not produced any evidence, other than his own affidavit attesting to his own limited personal knowledge, that this is the case in the Consumer Protection Division. On the other hand, Defendants have shown that the OIAG's various attorney classifications do require different duties, responsibilities, and qualifications. See Defs.' Exh. NN. As a Senior Assistant Attorney General, Levin was expected to "independently make prosecutorial and other litigation decisions . . . The position requires . . . experience in the practice of law and in trial of appellate

work along with approximately 10 years experience in the Attorney General's office as an Assistant Attorney General, or comparable experience in the practice of law." Defs.' Exh. NN. In contrast, Class 1 Assistant Attorneys General do not make independent litigation decisions, and must only have graduated from an accredited law school to be qualified. *Id.* Thus, the Court concludes that Levin is only comparable to other Senior Assistant Attorneys General.

Placing the aforementioned boundaries on Levin's proposed comparator pool results in one sufficient comparator: Joan Matlack.[14] See PSOF ¶ 80(s). Matlack, a female, was 49-years old when Levin was fired. *Id.* She was a Senior Assistant Attorney General in the Consumer Fraud Bureau in Chicago. Matlack's 2005 performance evaluation average score was similar to Levin's, yet she was not fired in May 2006. Nonetheless, for purposes of the direct method of proof, the fact that one similarly situated employee received better treatment does not create a reasonable inference that Defendants fired Levin because of his age.[15]

---

[14] Defendants concede that Matlack was similarly situated to Levin. Defs.' Resp. PSOF ¶ 80(s).

[15] However, the presence of a sufficient comparator, along with three other necessary requirements, permits Levin to make a prima facie case of age and sex discrimination under the

(continued...)

Finally, Levin contends that Defendants' destruction of relevant documents also supports an inference of discriminatory intent. However, as with his other proffered circumstantial evidence, Levin fails to make any connection between this supposed wrong and discriminatory animus. Levin has offered no evidence, other than his own speculation, that Spillane, Flahaven, and Rosen intentionally destroyed documents to hide discriminatory information. The parties briefed this issue during the discovery phase after Levin filed a motion for sanctions. R. 151. The magistrate judge denied Levin's motion and found that the documents were not discarded in bad faith. *See* R. 214. Levin fails to present the Court with any new evidence that Defendants acted in bad faith, and the Court declines Levin's invitation to draw any adverse influences from the destruction of those documents. In short, Levin's direct-method evidence does not show that the "real reason" he was fired was based on age. *See Van Antwerp*, 627 F.3d at 299; *Egonmwan v. Cook Cnty. Sheriff's Dep't*, 602 F.3d 845, 851-52 (7th Cir. 2010).

---

[15] (...continued)
indirect method. See infra at [84a-87a, 95a-98a].

b.

But Levin argues that he has sufficient evidence to show age discrimination using the indirect method. Under the indirect method, a plaintiff must show that (1) he is a member of a protected class; (2) he was meeting his employer's legitimate performance expectations; (3) he suffered an adverse employment action; and (4) he was treated less favorably than similarly situated individuals who are not over forty. *See Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1119 (7th Cir. 2009). Defendants contend that Levin has failed to establish a prima facie case of discrimination under the indirect method of proof.

With regard to the first and third requirements, it is undisputed that Levin was 61 years old at the time he was fired, and that his termination constituted an "adverse employment action" for the purposes of his prima facie case. Next, "[i]n contexts such as this, where a single employee is let go and another individual is hired instead, the fourth requirement means showing that the discharged worker was replaced with someone substantially younger." *Hoffman v. Primedia Special Interest Publ'ns*, 217 F.3d 522, 524 (7th Cir. 2000); *see also O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (in the age-discrimination context, the replacement of the plaintiff by someone substantially younger is a "reliable indicator of age discrimination");

Olson v. N. FS, Inc., 387 F.3d 632, 635-36 (7th Cir. 2004) (fourth prong of *McDonnell Douglas* need not be rigidly applied in age discrimination claims; it is sufficient for plaintiff to prove he was replaced with a person "substantially younger"). The Seventh Circuit has defined "substantially younger" as generally ten years younger. *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 321-22 (7th Cir. 2003).

Levin argues that he was replaced by 33-year old Junko Minami, thereby satisfying the fourth element of his prima facie case. PSOF ¶¶ 88-89. He points to the personnel transaction request produced by Defendants stating that "Ms. Minami will begin employment as an Assistant Attorney General in the Consumer Fraud Bureau effective September 1, 2006. She will replace Harvey Levin." Pl.'s Exh. D-16. However, Defendants deny that Minami actually replaced Levin. Defs.' Resp. PSOF ¶ 89. They contend that Minami did not take over any of Levin's work, and the term "replaced" only refers to head count. *Id.* Defendants' undisputed evidence shows that all of Levin's cases were indeed reassigned to a number of other attorneys in the Consumer Fraud Bureau. Defs.' Exh. OO ¶ 2. At her deposition, Minami testified that she has never been assigned a file handled by Levin. Defs.' Exh. PP at 55. Thus, Defendants argue that Levin's job responsibilities were absorbed by

several attorneys – not by a single person as Levin contends.

The parties do not provide the Court with any legal authority regarding what constitutes a "replacement" under prong four of the *McDonnell Douglas* test. In "mini-RIF" (reduction in force) cases, the Seventh Circuit interprets an employee's "replacement" to mean the person who absorbed the discharged employee's duties. *See Michas v. Health Cost Controls of Ill.*, 209 F.3d 687, 693 (7th Cir. 2000). However, in mini-RIF cases, a single employee is discharged and his position is not filled. Here, Levin has presented some evidence showing that Defendants hired someone substantially younger to replace him. In any event, Levin satisfies the fourth element by showing that at least one similarly-situated employee outside of his protected class was treated favorably. *See supra* at [82a]. At 49 years old, Joan Matlack was "substantially younger" than Levin at the time he was fired. *See Humphries*, 474 F.3d at 406-07 (7th Cir. 2007) (a single comparator will do); *Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir. 1995) ("The prima facie case, and specifically its fourth prong, are meant to identify situations where the actions taken by the employer, . . . if unexplained, are more likely than not based on consideration of impermissible factors."). Levin has satisfied the fourth element of his prima facie case.

Before the burden will shift to Defendants, however, Levin must also satisfy the second element and show that he reasonably performed to his employer's expectations. *Lesch v. Crown Cork & Seal Co.*, 282 F.3d 467, 472-73 (7th Cir. 2002). This is the heart of the dispute between the parties. Here, Levin relies on his written performance evaluations from 2000 through 2005. These evaluations do rate Levin's work as meeting, and in some categories even exceeding, his employer's expectations. Levin also points out that his supervisors continued to entrust him with difficult and complex cases up until the time he was terminated. R. 266 at 4. Taken together, the evidence Levin presents raises a genuine issue of material fact as to whether Levin was performing his job satisfactorily.

Because Levin has established a prima facie case of age discrimination, Defendants have the burden of articulating a legitimate, nondiscriminatory[16] reason for firing Levin. *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 742 (7th Cir. 1999). Defendants have articulated several legitimate, nondiscriminatory reasons for terminating Levin's employment. As already discussed, supra at

---

[16] As noted above, in defending against an Equal Protection Clause claim, Defendants could have argued that Levin was indeed treated differently based on age, but for a rational reason; instead, however, Defendants argue that, as a factual matter, Levin was not fired due to age.

[46a-50a], Defendants state that Levin was terminated because his "work ethic, productivity, performance, judgment, and human relations were not satisfactory for a lawyer of his experience and length of time with the Consumer Fraud Bureau." R. 180 at 10 (citing DSOF ¶¶ 62, 64). Defendants point to Levin's low enforcement numbers and his failure to move cases along efficiently. DSOF ¶¶ 14, 16. Defendants state that they questioned Levin's judgment based on the inappropriate comments he made during office meetings and the fact that he filed three or four consumer fraud complaints with the OIAG on behalf of himself or his wife. DSOF ¶¶ 24-25, 32-35. These reasons are facially legitimate, and the burden reverts to Levin to show that they are a pretext for age discrimination. *Johnson*, 170 F.3d at 742.

As the Seventh Circuit has noted many times, "when an employer has cited performance issues as the justification for its adverse action, the performance element of the prima facie case cannot be separated from the question whether the employer proffered a nonpretextual explanation for its challenged conduct." *Duncan v. Fleetwood Motor Homes of Ind., Inc.*, 518 F.3d 486, 491 (7th Cir. 2008). Indeed, in this case, Levin argues that his positive performance evaluations not only satisfy his obligation to show that he met Defendants' "legitimate job expectations" but they also show that Defendants' reasons for discharging him were pretextual. R. 226 at 1-2. "To show that an employer's

proffered reason is pretextual, a plaintiff must do more than demonstrate that the employer made a mistake . . . . Instead, the plaintiff must demonstrate the employer's reason is unworthy of belief." *Koski v. Standex Int'l Corp.*, 307 F.3d 672, 677 (7th Cir. 2002); *see Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 823 (7th Cir. 2006) (pretext means an explanation that is dishonest); *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992) ("[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather it addresses the issue of whether the employer honestly believes in the reasons it offers."). Levin can demonstrate pretext by creating a genuine issue of material fact as to whether the proffered reasons are: (1) factually baseless, (2) not the actual motivation for the discharge, or (3) insufficient to motivate the discharge (insufficient in the sense that a reasonable jury could conclude that the reasons were not the actual basis for the firing). *See Gusewelle v. City of Wood River*, 374 F.3d 569, 575 (7th Cir. 2004); *Johnson v. City of Fort Wayne*, 91 F.3d 922, 931 (7th Cir. 1996).

Levin manages to create a dispute of material fact when he contests the specific facts of what Defendants assert is a long history of critiquing and warning Levin about problems and complaints with his performance, judgment, and human relations skills. Although Defendants claim a history of concern with Levin's job

performance, Levin claims that he was unaware of any problems with his work until May 12, 2006, when he was fired. Levin thus argues that Defendants' reasons were manufactured post-hoc to justify the termination. He disputes many of the facts that Defendants claim make up a long history of evaluating and critiquing Levin before his termination. Levin's supervisors testify to a series of meetings with Levin over the years in which they communicated with Levin about his deficiencies. Levin either disputes that these meetings took place or disputes that the subject matter of these meetings included any criticisms of his performance. The fact that a good deal of Levin's evidence on this issue is exclusively his own testimony raises an issue for trial, not summary judgment. *See Payne v. Pauley*, 337 F.3d 767, 771 (7th Cir. 2003) ("We have routinely found that a nonmoving party's own affidavit can constitute affirmative evidence to defeat a summary judgment motion."). Levin is not required to show that Defendants' asserted reasoning is not true; he is required to show that it is not the actual reasoning underlying his termination. *See Emmen v. Coca-Cola Bottling Co.*, 95 F.3d 627, 634 (7th Cir. 1996).

In addition to his own testimony, Levin has presented affirmative, objective evidence that his performance was satisfactory. Levin argues that his positive written performance evaluations refute Defendants' belief that he was not meeting their

expectations. For instance, Levin's 2005 evaluation, which was completed five months before he was fired, states that Levin's "initiative" and "judgment" exceeded his employer's expectations. These reviews, among others, stand in stark contrast to Defendants' view of his performance at the time of his termination in early 2006. For instance, exceeding expectations for the "initiative" requirement meant that Levin was "[s]elf-reliant, independent, resourceful and willing to perform above and beyond the requirements of the job" and frequently contributed to the professional growth of others. *See* Pl.'s Exh. D-2. Levin's 2005 evaluation does not hint at any problems with his allegedly questionable human relations skills, and his score in this category demonstrates that Levin "[e]stablish[ed] and maintain[ed] appropriate rapport with other employees, clients, counsel, witnesses and the public." *Id.* Defendants contend that Charles Fergus was the only supervisor responsible for completing Levin's written evaluations and, thus, his views cannot be imputed to others in the chain of command. However, even if Defendants' criticisms of Levin's work and behavior are correct, Levin has raised a trial question as to whether these criticisms were the reasons for his termination to the exclusion of his age. In short, a jury must determine whether or not Levin's performance was satisfactory.

Also, Levin has demonstrated that at least one of Defendants' proffered reasons for firing him lacks a

solid factual foundation. Specifically, Spillane claims that she based her decision to fire Levin, in part, on his distasteful interactions with Rosen outside of the office. However, as Levin points out, Rosen testified that he did not know, before the firing decision was made, that the man following him home from work was Levin. Rosen stated that he learned it was Levin on May 12, 2006 – after Spillane had already decided to fire Levin. Thus, Rosen's affidavit refutes Spillane's testimony on this issue, as it was impossible for Rosen to report the negative encounters to Spillane before she decided to fire Levin.

To survive summary judgment, Levin must cast doubt on each of Defendants' justifications for terminating him; summary judgment is only appropriate when no reasonable factfinder could find that Defendants lied about the reasons it terminated Levin. *Rudin v. Lincoln Land Cmty. College*, 420 F.3d 712, 726 (7th Cir. 2005); *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 920 (7th Cir. 1996) (plaintiff must raise issue of fact regarding each of the reasons proffered for his dismissal or suffer the affirmance of the district court's grant of summary judgment). Here, Levin has presented evidence from which a reasonable jury could find that Defendants constructed a basis for terminating Levin and that the true reason for firing him was discriminatory. Levin's performance evaluations and the refutation of the Rosen interaction as a basis for

firing Levin call each of Defendants' proffered reasons into question. Accordingly, Levin has established a genuine issue of material fact as to pretext, and he is entitled to a jury determination of his age discrimination claim. Defendants' motion for summary judgment on Count 4 is denied.

C.

Turning to Levin's sex discrimination claim under § 1983, as with Title VII claims, a plaintiff may prove an equal protection violation using either the direct or indirect method of establishing discriminatory intent. *See Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 750 n.2 (7th Cir. 2006) (the analysis is the same for a claim under Title VII and a claim under § 1983; the only difference between the claims is who can be named as a defendant); *Riordan v. Kempiners*, 831 F.2d 690, 695-96 (7th Cir. 1987) (claim of intentional discrimination under the equal protection clause is subject to the same methods of proof as an analogous claim under Title VII). Again, Levin pursues both methods of proof.

a.

Under the direct method, Levin relies on the same circumstantial evidence used to support his age discrimination claim. Again, taken individually and collectively, the Court finds that his arguments do not

"point directly" to discriminatory reasons for Defendants' action. Thus, Levin cannot proceed with his sex discrimination claim under the direct method of proof. *See Atanus v. Perry*, 550 F.3d 662, 671 (7th Cir. 2008).

Levin's statistics and document-destruction arguments fail for the reasons already discussed. Again, the Court rejects Levin's argument that Defendants' decision to terminate him, Rantis, and Wojciechowski raises an inference of discriminatory intent. Almost half of the attorneys terminated in May 2006 were females. *See* Defs.' Exh. CC ¶ 4. Also, without repeating the entire analysis, the Court finds that, as with the age claim, the fact that there was one similarly situated, substantially younger female attorney who was not terminated in May 2006 is not enough for Levin to proceed under the direct method. However, this issue will be taken up further below, as it is also a required element of Levin's case under the indirect method. *See Hemsworth*, 476 F.3d at 490-91 (explaining that the indirect method "involves a subset of circumstantial evidence (including disparate treatment of similarly situated employees) that conforms to the prescription of [*McDonnell Douglas*]").

b.

Under the indirect method of proof, Levin must establish a prima facie case of sex discrimination by producing competent evidence that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was performing his job satisfactorily, and (4) a similarly situated individual outside his protected class was treated more favorably. *LaFary v. Rogers Group, Inc.*, 591 F.3d 903, 906-07 (7th Cir. 2010). "In reverse discrimination cases such as this one, [the Seventh Circuit has] replaced the first element with a requirement that the plaintiff show 'background circumstances' suggesting that the employer discriminates against the majority." *Stockwell v. City of Harvey*, 597 F.3d 895, 901 (7th Cir. 2010) (citing *Farr v. St. Francis Hosp. & Health Ctrs.*, 570 F.3d 829, 833 (7th Cir. 2009)) (male plaintiff alleging gender discrimination must set out background circumstances that show that the employer discriminates against the majority, or that there is something "fishy" going on).

It is undisputed that Levin suffered an adverse employment action, and the Court has already determined that Levin has presented sufficient evidence that he was performing his job satisfactorily. Thus, only the first and fourth elements remain at issue. First, Defendants argue that because Levin is a male claiming sex discrimination, the Court must initially consider

whether he satisfied the modified *McDonnell Douglas* test. R. 185 at 10-11. Indeed, the Seventh Circuit "has recognized that discrimination by employers against white men is a less common phenomenon than discrimination against minorities. For that reason, in order to gain the substantial benefits conferred by the use of the *McDonnell Douglas* test, the non-minority plaintiff must be able to plead facts to show why it is likely in this case, that an employer had engaged in such unusual behavior." *Phelan v. City of Chicago*, 347 F.3d 679, 684-85 (7th Cir. 2003) (citing *Mills v. Health Care Serv. Corp.*, 717 F.3d 450, 456-57 (7th Cir. 1999)).

Levin argues that he has satisfied the modified *McDonnell Douglas* standard. R. 226 at 22. Specifically, Levin points to the undisputed fact that Spillane, his female superior, made the decision to terminate him, as well as the decision to hire a female to fill the vacant position. He also points to the same hiring and promotion statistics the Court has already deemed unreliable. *See supra* at [76a-78a]. Levin claims these facts are enough to demonstrate the necessary "background circumstances" because, according to Levin, "[i]t is not surprising when women discriminate in favor of women." *Preston v. Wis. Health Fund*, 397 F.3d 539, 542 (7th Cir. 2005). Levin contends that his case is analogous to *Hague v. Thompson Distributing Co.*, 436 F.3d 816, 822 (7th Cir. 2006), where the white plaintiffs were able to satisfy the modified *McDonnell*

Douglas test in a reverse race discrimination case by presenting "evidence that their black boss fired them and replaced three of them with black employees, the fourth plaintiff's job was assumed by a black employee, and the fifth was not replaced." Although the record in this case does not specify the gender of each person hired to replace each of the male attorneys who were terminated in May 2006, Levin has offered evidence showing that females were hired to fill the vacancies left by two of the three males Spillane fired from the Consumer Fraud Bureau. Taking the facts in a light most favorable to Levin and drawing all reasonable inferences in his favor, the Court finds that he has shown the necessary "background circumstances" to establish the first element of a prima facie case. *See Texas Dep't Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

Regarding the fourth prong, Levin argues that he was treated less favorably than similarly situated individuals who were female. He identifies one similarly situated female employee who was not terminated: Joan Matlack. For the reasons discussed above, the Court agrees that Matlack is an adequate comparator and Levin establishes a prima facie case under the indirect method. *See Humphries*, 474 F.3d at 406-07 (7th Cir. 2007) (a single comparator will do); *Collier*, 66 F.3d at 890 ("The prima facie case, and specifically its fourth

prong, are meant to identify situations where the actions taken by the employer, . . . if unexplained, are more likely than not based on consideration of impermissible factors.").

The burden-shifting analysis applied to Levin's age discrimination claim carries equal force here. Defendants have come forward with legitimate, non-discriminatory reasons for Levin's discharge, thereby shifting the burden back to Levin to prove that these reasons are not honest. As with his age discrimination claim, Levin's positive performance evaluations are evidence sufficient to support an inference that Defendants did not honestly believe that his performance was deficient. Although Defendants claim to have relied on other incidents outside of the formal, written evaluations in making the decision, Levin disputes Defendants' characterization of these incidents or that they even occurred. Because Levin creates a dispute of material fact over whether Defendants' concerns with his performance were a pretext for discrimination, Defendants' motion for summary judgment is denied as to Count 3.

D.

Having determined that Levin established a prima facie case of age and sex discrimination, the Court's next inquiry is whether the Individual Defendants are

subject to liability for the allegedly discriminatory action. "To survive summary judgment, a plaintiff claiming a violation of § 1983 must produce evidence that the defendant 'caused or participated in [the] constitutional deprivation.'" *Delapaz v. Richardson*, 634 F.3d 895, 899 (7th Cir. 2011); *Palmer v. Marion Cnty.*, 327 F.3d 588, 594 (7th Cir. 2003). For supervisors,

> [a]n official satisfies the personal responsibility requirement of section 1983 . . . if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye. In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery.

Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

Here, it is undisputed that Spillane made the decision to terminate Levin's employment. DSOF ¶ 63. Defendants also admit that Flahaven, Rosen, and Hagan contributed to the 2006 performance review and concurred that Levin should be terminated. DSOF ¶¶ 44-46, 58-60, 62. Flahaven and Rosen met with Levin to

inform him of his termination. Defs.' Resp. PSOF ¶ 70. Thus, the Court finds that Levin has presented sufficient evidence to create a causal link between the alleged constitutional violation and Spillane, Flahaven, Rosen, and Hagan.

Levin also claims that Attorney General Madigan was personally involved in Spillane's decision to fire him. R. 226 at 29. However, the only evidence in the record is that Madigan approved an overall approach and plan for the detailed review of attorney performance, and then conferred with Spillane once the termination decisions had been made. DSOF ¶¶ 45, 66. Attorney General Madigan does not recall whether Spillane told her the names of the attorneys being terminated. Defs.' Exh. CC ¶ 3(f). Levin fails to present any evidence that Madigan had knowledge of facts that would cause her to believe that Spillane was about to make an illegal decision but failed to use her authority to stop the violation. The record, even when read in the light most favorable to Levin, does not support a conclusion that Madigan had knowledge that an unlawful termination was imminent. *See Morfin v. City of East Chicago*, 349 F.3d 989, 1001 (7th Cir. 2003) (supervisors are not automatically liable under § 1983 for subordinates' constitutional torts). Therefore,

summary judgment is entered in favor of Attorney General Madigan in her individual capacity.[17]

V.

For the reasons stated above, Defendants' motions for summary judgment [R. 178, 191] are granted as to Counts 1 and 2, and denied as to Counts 3 and 4 against the Office of the Illinois Attorney General, Ann Spillane, Alan Rosen, Roger Flahaven, and Deborah Hagan. Additionally, summary judgment is granted in favor of Attorney General Madigan in her individual capacity.

The Court again emphasizes that summary judgment determinations are made by viewing the evidence in the light most favorable to the non-movant, here Levin, and by taking all reasonable inferences in his favor. The jury might well find otherwise at a trial where the evidence is not automatically viewed in

---

[17] Because Levin also seeks prospective relief in the form of reinstatement, the official capacity claim against Madigan, which is treated like a claim against the state, remains in the case. The State of Illinois and the OIAG, however, are dismissed because they are not suable "persons" as that term is used in § 1983, *Will v. Michigan Dept' of State Police*, 491 U.S. 58, 70-71 (1989), and because of the Eleventh Amendment bar, *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). *See also Leavell v. Ill. Dep't of Resources*, 600 F.3d 798, 808 n.6 (7th Cir. 2010).

Levin's favor and where Levin bears the burden of proof.

Appendix C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Harvey Levin,	)	
	)	
Plaintiff,	)	Case No. 07 C 4765
	)	
v.	)	Judge David H. Coar
	)	
Lisa Madigan, individually, and as Illinois Attorney General; Office of the Illinois Attorney General; State of Illinois; Ann Spillane; Alan Rosen; Roger P. Flahaven; and Deborah Hagan,	)	
	)	
Defendants.	)	

March 10, 2010.

MEMORANDUM OPINION AND ORDER

DAVID H. COAR, District Judge.

Plaintiff, Harvey Levin ("Levin" or "Plaintiff"), a former Senior Assistant Attorney General, brings an action against the State of Illinois, the Office of the Illinois Attorney General, Lisa Madigan, individually and in her official capacity as Attorney General, and four senior members of the Office of the Illinois Attorney General in their individual capacities (collectively, "Defendants"), alleging that his employment was terminated on the basis of his age and gender. Plaintiff's four-count complaint sets forth the following claims: age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (Count I), sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* (Count II), sex discrimination in violation of the equal protection clause of the 14th Amendment under 42 U.S.C. § 1983 (Count III), and age discrimination in violation of the equal protection clause of the 14th Amendment under 42 U.S.C. § 1983 (Count IV). Presently before this Court are three motions: (1) the individual Defendants' motion to dismiss [Dkt. 36], (2) the issues pending from the first motion to dismiss filed by Defendants Lisa Madigan, the Office of the Attorney General, and the State of Illinois [Dkt. 33], and (3) the second motion to dismiss filed by Defendants Lisa Madigan, the Office of the Attorney General, and the State of Illinois [Dkt. 58]. For the reasons stated below, the individual Defendants' motion to dismiss [Dkt. 36] is granted in part and denied in

part, the entity Defendants' first motion to dismiss [Dkt. 33] is granted in part and denied in part, and the entity Defendants' second motion to dismiss [Dkt. 58], which the Court construes as a motion for reconsideration, is denied.

FACTUAL BACKGROUND[1]

Plaintiff, Harvey Levin, a 62-year-old male, was employed as a Senior Assistant Attorney General in the Consumer Fraud Bureau of the Illinois Attorney General's Office at the time of his termination on May 12, 2006. He was hired as an Assistant Attorney General on September 5, 2000 by Patricia Kelly, the Chief of Consumer Protection, with the approval of Roger Flahaven, the Deputy Attorney General for Civil Litigation. In 2002, Levin was promoted to Senior Assistant Attorney General, the second lowest attorney position in the office.

Levin's job performance was more than satisfactory, and he consistently met or exceeded his employer's

---

[1] For the purpose of resolving Defendants' motions to dismiss, the Court accepts the allegations in Plaintiff's First Amended Complaint as true and draws all possible inference in favor of Plaintiff. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008).

legitimate job expectations. On the last performance review prior to his termination, Levin received ratings of "Exceeds Expectations" in six of twelve categories and "Meets Expectations" in the remaining categories. Levin was replaced by a less qualified, substantially younger female. Around the same time that Levin was terminated, Defendants also terminated two other male Assistant Attorneys General who were over the age of 50 and whose work performances were satisfactory or better. Both were also replaced with younger, less qualified females.

Defendants filed their first motions to dismiss in November 2007, and in December 2007, this Court ordered the parties to address specifically whether, as a matter of law, an Assistant Attorney General is an "employee" under the ADEA and Title VII. On September 12, 2008, the Court held that Plaintiff was not exempt from employee status under either Title VII or the ADEA because he was not appointed by the Attorney General. *Levin v. Madigan*, No. 07 C 4765, 2008 WL 4287778, at *5, 2008 U.S. Dist. LEXIS 84616, at *14 (N.D. Ill. Sept. 12, 2008). The Court now considers the remaining arguments in Defendants' initial motions to dismiss, as well as the second motion to dismiss filed by Defendants Lisa Madigan, Illinois Attorney General, the Office of the Attorney General, and the State of Illinois.

ANALYSIS

I. Defendants' Second Motion to Dismiss

The Court first addresses the second motion to dismiss filed by Defendants Lisa Madigan, Illinois Attorney General, the Office of the Attorney General, and the State of Illinois. Defendants move to dismiss Counts I and II of Plaintiff's complaint, which allege violations of Title VII and the ADEA, for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). Title VII and the ADEA protect "employees" from unlawful employment practices, 42 U.S.C. § 2000e-2; 29 U.S.C. § 623(a), yet exclude from coverage elected officials and certain members of their staffs. *See* 42 U.S.C. § 2000e(f); 29 U.S.C. § 630(f). Defendants argue that, given the additional facts the Court may consider under their 12(b)(1) motion, Plaintiff is not an "employee" covered by Title VII or the ADEA. Plaintiff contends that the issue of whether a party is an "employee" under these statutes is not the proper subject of a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The Court agrees.

In *Arbaugh v. Y & H Corp.*, the United States Supreme Court held that the issue of whether a party is an "employer" under Title VII was an element of the party's claim for relief relating to the merits, not a jurisdictional requirement; therefore, that issue was not

the proper subject of a 12(b)(1) motion to dismiss on jurisdictional grounds. 546 U.S. 500, 516 (2006). In reaching this decision, the Court reasoned that the provision of Title VII dealing with the definition of an "employer" "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515, (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)) (internal quotation marks omitted). This observation led the Court to identify a "readily administrable bright line:"

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16 (citation and footnote omitted).

Applying that rule here, Congress' failure to designate "employee" status as a threshold jurisdictional issue means that the Court should treat this restriction as nonjurisdictional. *See id.* Indeed, Congress included the definition of "employee" in the same section as the definition of "employer" at issue in

Arbaugh, *see* 42 U.S.C. § 2000e(f), and "has not suggested that the definition of 'employee' has any greater jurisdictional significance than the definition of 'employer.'" *Harris v. Attorney Gen. of the U.S.*, 657 F. Supp. 2d 1, 8 (D.C. Cir. 2009); *see also Xie v. Univ. of Utah*, 243 Fed. Appx. 367, 371 (10th Cir. 2007) ("As with the fifteen-or-more employees requirement addressed in *Arbaugh*, there is no indication that Congress considered employee status to be a threshold jurisdictional requirement."). Accordingly, *Arbaugh* requires that the Court characterize Plaintiff's "employee" status as a question relating to the merits of his case rather than as a jurisdictional issue.

Defendants correctly point out that Plaintiff fails to identify a case from the Seventh Circuit or any district court in Illinois which holds specifically that the question of whether a party is an "employee" under Title VII or the ADEA is nonjurisdictional. Nor has the Court been able to find such a case. Nevertheless, based on the clear rule stated by the Supreme Court in *Arbaugh*, and its application by other circuits to identical facts, the Court holds that the question of Plaintiff's "employee" status is nonjurisdictional. Every circuit court to consider this issue has found accordingly. *See Harris*, 657 F. Supp. 2d at 8 (applying *Arbaugh* and concluding that the "employee" requirement of Title VII is nonjurisdictional); *Townsend v. Shook*, 323 Fed. Appx. 245, 250 (5th Cir. 2009) ("we

hold that application of Title VII's personal staff exclusion does not present a lack of subject matter jurisdiction issue") (footnote omitted); *Xie*, 243 Fed. Appx. at 371 ("in light of the Supreme Court's decision in *Arbaugh*, we now conclude that employee status is an element of Dr. Xie's Title VII claims rather than a matter of subject matter jurisdiction.") (footnote omitted). Because the issue of Plaintiff's "employee" status is nonjurisdictional, it is not the proper subject of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Instead of rejecting Defendants' motion outright, the Court construes this motion as a motion for reconsideration. Although Defendants suggest this alternative, they fail to cite a Federal Rule of Civil Procedure under which the Court may consider their motion for reconsideration. Typically, courts consider motions for reconsideration, which challenge the merits of a district court's decision, under either Rule 59(e) or Rule 60(b). *See Mares v. Busby*, 34 F.3d 533, 535 (7th Cir.1994); *Mitchell v. Bledsoe*, No. 06-624-DRH, 2010 WL 432268, at *1, 2010 U.S. Dist. LEXIS 8778, at *1-2 (S.D. Ill. Feb. 2, 2010). Because Defendants failed to file this motion within the timeframe required by Rule 59(e),[2] the Court must analyze their motion under Rule

---

[2] As of December 1, 2009, Rule 59(e) allows a party 28 days (continued...)

60(b). *See Kiswani v. Phoenix Sec. Agency, Inc.*, 584 F.3d 741, 742-43 (7th Cir. 2009).

Relief from judgment under Rule 60(b) "is an extraordinary remedy granted only in exceptional circumstances." *Pullen-Walker v. Roosevelt Univ.*, 263 Fed. Appx. 517, 518 (7th Cir. 2008) (citing *Karraker v. Rent-A-Center*, 411 F.3d 831, 837 (7th Cir. 2005)). Under Rule 60(b), courts may grant parties relief on several narrow grounds including mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. *See* Fed.R.Civ.P. 60(b). However, "the rule is not intended to correct mere legal blunders," *Cash v. Ill. Div. of Mental Health*, 209 F.3d 695, 697 (7th Cir. 2000), and "[r]econsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1270 (7th Cir. 1996).

---

[2] (...continued)
after the entry of judgment in which to file a motion to alter or amend a judgment. Previously, Rule 59(e) allowed only 10 days for the filing of such a motion. As the Court entered the judgment at issue on September 12, 2008, and Defendants filed the instant motion on October 15, 2008, Defendants failed to file their motion within the proper timeframe under either the old or the new rule.

The basis for Defendants' motion is that a "manifest error of fact" caused the Court to conclude improperly that Plaintiff was an "employee" under Title VII and the ADEA. Defendants specifically challenge the Court's holding that Plaintiff was not appointed by an elected official and therefore failed to fall within the provisions excluding elected officials and their personal staff members from the protection of Title VII and the ADEA. *See* 42 U.S.C. § 2000e(f); 29 U.S.C. § 630(f). According to Defendants, Plaintiff misrepresented the facts necessary to the Court's consideration of whether Plaintiff was appointed by an elected official (namely, Attorney General James Ryan). However, Defendants fail to provide evidence that supports this serious allegation. Instead, Defendants essentially repackage the same arguments already considered and rejected by this Court. In that vein, Defendants' motion revolves around several documents they claim indicate Plaintiff's acknowledgment that he was appointed by the Attorney General. These documents consist of a form Plaintiff signed, which is entitled "Attorney General's Rules of Professional Conduct Compliance Statement Form" and states that Plaintiff was "duly appointed to serve by Attorney General Jim Ryan," and two "certificates of appointment" in Plaintiff's name-one issued under Attorney General Ryan's tenure, and another issued by Attorney General Lisa Madigan when she took office. Quoting from these exact documents in support of their first motion to dismiss, Defendants pointed out that

"[t]he certificate states that Harvey Levin 'has been appointed Assistant Attorney General and is authorized and empowered to execute and fulfill the duties of that Office according to the law, and to have and to hold the said Office, with all of the powers, privileges, and emoluments thereunto appertaining during the pleasure of the Attorney General.'" (R. 52, Defs' Reply Br. in Supp. of Defs' First Mot. to Dismiss at 8-9.)

Invoking the same "certificates of appointment" again here, Defendants argue that these documents demonstrate that Plaintiff misled the Court by claiming that he was not appointed by Attorney General James Ryan and by offering evidence that he was hired by Patricia Kelly, the Chief of Consumer Protection, with the approval of Roger Flahaven, Deputy Attorney General of Civil Litigation. However, Defendants neither present new arguments nor offer any evidence that Plaintiff was not in fact hired by Patricia Kelly, without any participation by Attorney General James Ryan. Perhaps Defendants take issue with the Court's legal conclusion that Plaintiff was "appointed" by the individuals who hired him, not by the Attorney Generals whose names formally appear on his certificates of appointment. However, a Rule 60(b) motion is not the proper vehicle for a challenge to the Court's legal analysis. *See Cash,* 209 F.3d at 697. Defendants have failed to demonstrate that exceptional circumstances justify the extraordinary remedy of relief

under Rule 60(b), and their motion for reconsideration is therefore denied.

II. Defendants' Initial Motions to Dismiss

The Court now turns to the initial motions to dismiss filed by Defendants. Defendants, Lisa Madigan, Illinois Attorney General, the Office of the Attorney General, and the State of Illinois (the "Entity Defendants") and Defendants, Lisa Madigan, individually, Ann Spillane, individually, Roger Flahaven, individually, and Deborah Hagan, individually (the "Individual Defendants") filed separate motions to dismiss. Before considering each motion separately, the Court will address the issues common to both motions.

a. Legal Standard

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court accepts all well-pleaded allegations in the plaintiff's complaint as true and draws all possible inferences in favor of the plaintiff. Fed.R.Civ.P. 12(b)(6); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (internal quotation

marks omitted). Accordingly, to survive a motion to dismiss, a complaint must simply "state a claim that is plausible on its face." *Bell Atlantic v. Twombly,* 550 U.S. 544, 570 (2007). A claim is plausible on its face if it demonstrates "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949. The plaintiff's factual allegations need not be "detailed," but they must include more than "labels and conclusions" in order to "give the defendant fair notice of what ... the claim is and the grounds upon which it rests." *Twombly,* 550 U.S. at 555 (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)) (internal quotation marks omitted).

b. Sufficiency of Plaintiff's Pleadings

In both of their initial motions to dismiss, Defendants argue that Plaintiff has not pled sufficiently detailed factual allegations to survive a 12(b)(6) motion to dismiss in the wake of *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007). Defendants, however, overlook the minimal pleading standard required for employment discrimination claims. *See Tamayo v. Blagojevich,* 526 F.3d 1074, 1084 (7th Cir. 2008). Because Plaintiff has satisfied this standard, the Court rejects Defendants' argument.

Applying *Twombly* to claims of employment discrimination, the Seventh Circuit in *Tamayo v.*

Blagojevich "acknowledg[ed] that a complaint must contain something more than a general recitation of the elements of the claim," but "reaffirmed the minimal pleading standard for simple claims of race or sex discrimination." *Id.* at 1084; *see also Velazquez v. Office of Ill. Scy. of State,* No. 09 C 3366, 2009 U.S. Dist. LEXIS 101588, *5-8 (N.D. Ill. Nov. 2, 2009) (describing the minimal pleading standard for employment discrimination claims after *Twombly* and *Tamayo*). *Twombly* established "two easy-to-clear hurdles" for a complaint in federal court: (1) the complaint must provide sufficient notice to enable the defendant to investigate and prepare a defense, and (2) the allegations must suggest a plausible-not merely speculative-right to relief. *Tamayo,* 526 F.3d at 1084 (quoting *EEOC v. Concentra Health Servs., Inc.,* 496 F.3d 773, 776 (7th Cir. 2007)). Even after the heightened pleading standard set forth in *Twombly,* a complaint alleging employment discrimination "need only aver that the employer instituted a (specified) adverse employment action against the plaintiff on the basis of her sex." *Tamayo,* 526 F.3d at 1084. The complainant "need not allege either the factual or legal 'elements' of a prima facie case under the employment-discrimination laws." *Simpson v. Nickel,* 450 F.3d 303, 305 (7th Cir. 2006) (citing *Swierkiewicz v. Sorema,* 534 U.S. 506 (2002)). Explaining the minimal pleading standard required for employment discrimination claims, the Seventh Circuit has noted

that "[p]eople have reasonably clear ideas of how a racially biased person might behave, and a defendant responding to an allegation of racial bias can anticipate the sort of evidence that may be brought to bear and can investigate the claim." *Concentra,* 496 F.3d at 782. Moreover, "once a plaintiff alleging illegal discrimination has clarified that it is on the basis of her race, there is no further information that is both easy to provide and of clear critical importance to the claim." *Id.* An allegation that states "quite generally," "I was turned down for a job because of my race" is sufficient to survive a 12(b)(6) motion to dismiss. *Id.*

Contrary to Defendants' argument, Plaintiff has satisfied the minimal pleading standard for his sex and age discrimination claims. Plaintiff alleges that he is a 62-year-old male who was meeting his employer's legitimate expectations, when he was nonetheless terminated and replaced by a substantially younger, less qualified female employee. Plaintiff also pleads that, around the same time that his employment was terminated, Defendants terminated two other male Assistant Attorneys General who were over the age of 50 and whose work performances were satisfactory or better. Plaintiff alleges that, like him, these employees were replaced by younger, less qualified females. Although Plaintiff only had to plead that he suffered an adverse employment action on the basis of his sex or age, *see Tamayo,* 526 F.3d at 1084, Plaintiff nonetheless

pleads facts supporting a prima facie case under Title VII and the ADEA. These facts certainly provide Defendants with sufficient notice to investigate and prepare a defense against Plaintiff's claims. *See id.* Moreover, "it is difficult to see what more [Plaintiff] could have alleged, without pleading evidence, to support [his] claim that [ ]he was discriminated against" based on his sex or age. *Id.* at 1085; *see Heinze v. S. Ill. Healthcare,* No. 08-672-GPM, 2010 WL 276722, at *3-4, 2010 U.S. Dist. LEXIS 3931, at *11-12 (S.D. Ill. Jan. 19, 2010) (plaintiff's age and gender discrimination claims survived a 12(b)(6) motion to dismiss where she pled that she was female, over fifty years old, performed her job satisfactorily, was terminated, and was replaced by a less qualified male employee eleven years younger than her).[3]

---

[3] Plaintiff's attempt to analogize this case to the dismissal of the plaintiff's complaint in *Jackson v. Casey,* No. 07 C 5348, 2007 WL 2792150, 2007 U.S. Dist. LEXIS 70856 (N.D. Ill. Sept. 25, 2007), must fail. In that case, the plaintiff pled "several skeletal and purely conclusory" allegations of race discrimination, and the court dismissed his claims because his "conclusory playing of the race card . . . [wa]s totally speculative, rather than plausible." *Id.* at *1, 2007 U.S. Dist. LEXIS 70856 at *2. Unlike the plaintiff in *Jackson,* here, Plaintiff pleads that he suffered a specific adverse employment action–he was terminated–on the basis of his race or gender. That is all he must do to survive a 12(b)(6) motion to dismiss for failure to state a claim. *See Tamayo,* 526 F.3d at 1084.

Defendants next argue that Plaintiff has pled himself out of court by alleging facts which demonstrate that he has no claim. *See Jackson v. Marion County,* 66 F.3d 151, 153 (7th Cir. 1995). Specifically, Defendants contend that Plaintiff pleads facts demonstrating that he failed to meet his employer's legitimate job expectations, justifying his termination on nondiscriminatory grounds. To support their argument, Defendants points to the following facts alleged in Plaintiff's complaint:

> (1) "Senior Assistant Attorneys General have no discretion and no authority whatsoever in deciding which cases or lawsuits are filed, prosecuted, defended, or settled" (Compl. ¶ 25(e));
>
> (2) "Senior Assistant Attorneys General do not have any authority or discretion to decide what words, sentences, or phrases are placed in a lawsuit, or in the resolution of a lawsuit" (*Id.* at ¶ 25(f)); and
>
> (3) "Senior Assistant Attorneys General do not independently make prosecutorial and other litigation decisions" (*Id.* at ¶ 25(m)).

By asserting this argument, Defendants defy the obligation to "accept all well-pleaded allegations in the

complaint as true and draw all reasonable inferences in favor of the plaintiffs." *Christensen v. County of Boone*, 483 F.3d 454, 457 (7th Cir. 2007). Instead, Defendants misrepresent Plaintiff's allegations by suggesting that claims about the nature of the Senior Assistant Attorney General *position* somehow demonstrate that *Plaintiff* performed his job unsatisfactorily. To that end, Defendants ignore the only paragraphs of Plaintiff's complaint directed to his job performance. In these paragraphs, Plaintiff pleads:

> (1) "Throughout his employment, his job performance was more than satisfactory and he consistently met or exceeded his employer's legitimate job expectations" (Compl. ¶ 7.)
>
> (2) "Defendants' last performance rating of plaintiff prior to May 12, 2006 rated plaintiff as 'Exceeds Expectations'--the highest rating on six out of twelve categories and 'Meets Expectations' on the remaining performance criteria." (*Id.* at ¶ 8.)

Well-settled law requires the Court to accept these allegations as true and draw all reasonable inferences in the light most favorable to Plaintiff. *Christensen*, 483 F.3d at 457. The Court must therefore reject

Defendants' argument that Plaintiff has pled himself out of court by pleading that he was not meeting his employer's legitimate expectations.

c. Individual Defendants' Motion to Dismiss

The Court now turns to the separate issues raised by the Individual Defendants and the Entity Defendants in their motions to dismiss, beginning with the Individual Defendants' motion to dismiss.

i. ADEA Exclusivity

In Count IV of his amended complaint, Plaintiff asserts an equal protection claim for age discrimination in violation of 42 U.S.C. § 1983. The Individual Defendants move to dismiss Count IV, arguing that the ADEA provides the exclusive federal remedy for age discrimination, and therefore claims alleging age discrimination under § 1983 are not permitted. The Seventh Circuit has not yet addressed this issue, although one Northern District of Illinois judge confronted with this question found "no reason to foreclose state and local employees from bringing age discrimination claims under § 1983, just as they can assert sex or race discrimination claims under § 1983." *McCann v. City of Chicago,* No. 89 C 2879, 1991 WL 2538, at *2, 1991 U.S. Dist. LEXIS 83, at *7 (N.D. Ill. Jan. 3, 1991) (holding that the ADEA did not prohibit

an age-based equal protection challenge to a statute). *But see Tucker v. George*, No. 08-cv-0024-bbc, 2009 WL 1444194, at *3 (W.D. Wis. May 21, 2009) (stating in dicta that "whether plaintiff can prosecute her age discrimination claim by way of a § 1983 equal protection claim is in serious doubt"). Plaintiff correctly points out that, over the years, this circuit has entertained many age discrimination claims brought against state actors under the equal protection clause. *See, e.g., Gault v. Garrison*, 569 F.2d 993, 996 (7th Cir. 1977); *Kolz v. Bd. of Educ. of the City of Chicago*, No. 77-C-2548, 1978 U.S. Dist. LEXIS 14464 (N.D. Ill. Nov. 8, 1978); *Van Arsdel v. Indiana Util. Regulatory Comm'n*, No. IP 88-384-C, 1990 WL 158709, at *1-2, 1990 U.S. Dist. 13936, at *3-4 (S.D. Ind. Mar. 9, 1990); *Haag v. Bd. of Educ.*, 655 F. Supp. 1267, 1274 (N.D. Ill. 1987); *McCann*, 1991 WL 2538, at *2-3, 1991 U.S. Dist. LEXIS 83, at *7. However, none of these decisions squarely addresses the question at issue in this case: whether the ADEA provides the exclusive federal remedy for age discrimination in employment, thus foreclosing age discrimination claims brought pursuant to § 1983.

The authority on this issue in other circuits points in many directions. Several courts of appeals have held that the ADEA provides the exclusive remedy for age discrimination claims and therefore precludes age discrimination suits brought under § 1983. *See Ahlmeyer v. Nevada System of Higher Educ.*, 555 F.3d

1051 (9th Cir. 2009); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Lafleur v. Texas Dept. of Health*, 126 F.3d 758 (5th Cir. 1997); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989).[4] Defendants rely primarily on the leading circuit court decision on the issue: the Fourth Circuit's opinion in *Zombro v. Baltimore*. In *Zombro*, the Fourth Circuit reasoned that the comprehensiveness of the ADEA's statutory scheme indicates Congress' intent to establish an exclusive remedy for age discrimination; otherwise, "if 42 U.S.C. § 1983 is available to the ADEA litigant, the congressional scheme behind ADEA enforcement could easily be undermined, if not destroyed." *Id.* at 1367.

The district court decisions on the subject are deeply divided. In *Mummelthie v. City of Mason*, a case on which Plaintiff relies, a district court in the Northern District of Iowa performed a highly comprehensive analysis of the language, structure, and legislative

---

[4] The Fifth Circuit's decision in *Lafleur*, on which the Tenth Circuit heavily relies in *Migneault*, is distinguishable from this case. In *Lafleur*, the Court held that "where the facts alleged will not independently support a § 1983 claim, the plaintiff's age discrimination claim is preempted by the ADEA." *Lafleur*, 126 F.3d at 760. The Court has no qualms with this decision. Unlike *Lafleur*, Plaintiff here alleges a § 1983 claim for violations of an independent constitutional right under the equal protection clause, not a right created by the ADEA itself.

history of the ADEA and concluded that the ADEA does not provide the exclusive remedy for age discrimination claims. 873 F. Supp. 1293 (N.D. Iowa 1995). Although the district courts remain fractured in the wake of *Zombro* and *Mummelthie*, one district court has noted that "[a] recent trend favors *Mummelthie*'s interpretation." *Mustafa v. Nebraska Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 955 n.11 (D. Neb. 2002) (collecting cases).

In *Mummelthie*, the court criticized the Fourth Circuit's decision in *Zombro* for overlooking the instructive analogy between the ADEA and Title VII, which does not foreclose equal protection claims for race and sex discrimination brought under § 1983, and for considering neither "the statutory language of the ADEA itself nor its legislative history, before concluding that the ADEA provided the exclusive federal remedy for age discrimination in employment." *Mummelthie*, 873 F. Supp. at 1319. Building from the Iowa district court's decision in *Mummelthie*, which performed a significantly more searching analysis of the ADEA than any of the appellate courts to address this issue, the Court concludes that the ADEA does not foreclose Plaintiff's equal protection claim for age discrimination under § 1983. As discussed below, this decision is informed by (1) the Supreme Court's well-settled distaste for repeals by implication, (2) the Seventh Circuit's acknowledgement that Title VII does not

preclude equal protection claims for race and sex discrimination under § 1983, coupled with this circuit's recognition of the parallels between Title VII and the ADEA, and (3) the language and legislative history of the ADEA.

The Supreme Court generally disfavors repeals by implication and therefore requires "irreconcilable conflict" between two statutes in order to find that the later statute preempts the earlier one. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal citations and quotation marks omitted); *Rogers v. Baxter Int'l*, 521 F.3d 702, 705 (7th Cir. 2008). Where "two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l*, 534 U.S. 124, 143-44 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (internal quotation marks omitted). When analyzing statutes enacted to protect federal rights after § 1983, the Supreme Court has opined that a statute's comprehensive enforcement mechanism may demonstrate Congress' intent to foreclose a remedy under § 1983. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (citing *Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981)). However, in *Golden State*, the Court cautioned:

> The availability of administrative mechanisms to protect the plaintiff's interest is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. Rather, the statutory framework must be such that allowing a plaintiff to bring a § 1983 action would be inconsistent with Congress' carefully tailored scheme. The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant.

Id. at 106-07. As further demonstrated by decisions following *Golden Gate*, the Supreme Court is loath to imply that a statute forecloses § 1983 remedies simply because it provides a comprehensive remedial scheme. *See Blessing v. Freestone*, 520 U.S. 329, 347 (1997) ("Only twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983."); *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994) (cases in which congressional intent to foreclose a § 1983 remedy may be inferred from a comprehensive remedial scheme are "exceptional," and § 1983 otherwise "remains a generally and presumptively available remedy for claimed violations of federal law"). The Court finds that Defendants have not met their burden to demonstrate that Congress has expressly withdrawn § 1983 remedies for age discrimination by enacting the ADEA; just as

Title VII and § 1983 are "capable of coexistence" in this circuit, so too are the ADEA and § 1983.

The Court's conclusion finds support in the well-recognized analogy between the ADEA and Title VII, which does not preclude § 1983 remedies. Acknowledging the similarities between Title VII and the ADEA, both the Supreme Court and the Seventh Circuit have turned to Title VII for help interpreting the provisions of the ADEA. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56, (1979) (relying on Title VII to interpret the ADEA); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271 (7th Cir. 1986) ("The Supreme Court and our court have recognized 'important similarities' in objectives, substantive prohibitions, and legislative histories between the ADEA's protection against age discrimination and Title VII's protection against employment discrimination on the basis of race, sex, or religion."); *E.E.O.C. v. Elrod*, 674 F.2d 601, 607 (7th Cir. 1982) ("We find the history of Title VII particularly helpful because it is the legislation which most closely parallels the ADEA.").[5] The Court therefore finds

---

[5] In *Zombro*, the Fourth Circuit relied on the Fair Labor Standards Act "FLSA" when interpreting the ADEA. *Zombro*, 868 F.2d at 1369. However, the Seventh Circuit has held that Title VII provides a more useful comparison than the FLSA. *Kelly*, 801 F.2d at 271 ("the connection of the ADEA amendments to the legislation enacting FLSA amendments was

(continued...)

significance in the Seventh Circuit precedent recognizing that Title VII does not preclude claims alleging discrimination under § 1983. *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 732 (7th Cir. 2004) ("The Supreme Court has never discussed the most common overlap–Title VII and § 1983 when the employer is a state actor-but like other appellate courts we have held that employees may resort to both statutes despite the substantial differences in their terms."); *Trigg v. Fort Wayne Cmty. Schs.*, 766 F.2d 299, 302 (7th Cir. 1985) (state employee could sue state government employer for violations of the 14th Amendment under § 1983 even if the same facts would suggest a violation of Title VII); *Collins v. Cook County*, No. 06 CV 6651, 2008 WL 4925009, at *10 (N.D. Ill. Nov. 14, 2008) ("Claims of discrimination under § 1983 may be brought in addition to any claims an employee has under Title VII."). Based on the close relationship between Title VII and the ADEA, the Court concludes that just as Title VII preserves litigants' rights to assert race or sex discrimination claims under § 1983, the ADEA permits litigants like Plaintiff to bring § 1983 claims alleging age discrimination in violation of constitutional rights. *See McCann*, 1991 WL 2538 at *2-3, 1991 U.S. Dist. LEXIS 83 at *7 (finding "no reason to foreclose state and local

---

[5] (...continued)
largely fortuitous") (quoting *Elrod*, 674 F.2d at 610) (internal quotation marks omitted).

employees from bringing age discrimination claims under § 1983, just as they can assert sex or race discrimination claims under § 1983."); *Haag v. Bd. of Educ.*, 655 F. Supp. 1267, 1274 (N.D. Ill. 1987) (plaintiff alleging violations of the 14th Amendment "is not limited to Title VII and the ADEA, but may also bring her complaint under section 1983").

Finally, the Court turns to the language and history of the ADEA, a topic overlooked by both the Fourth Circuit in *Zombro* and the most recent court of appeals to consider the exclusivity of the ADEA, the Ninth Circuit in *Ahlmeyer*.[6] The analysis alternatively provided by the court in *Mummelthie* is instructive. First addressing the statute's language, the *Mummelthie* court concluded that "[b]ecause the language of the ADEA does not purport to extend the Act to constitutional rights, nor hint at any attempt at exclusivity, ... Congress did not intend the ADEA to provide the exclusive, indeed any, remedy for violation

---

[6] In *Mummelthie*, the court criticized the *Zombro* court for failing to analyze the ADEA's language and legislative history and "instead inferring congressional intent from the comprehensiveness of the ADEA." 873 F. Supp. at 1324-25. The court continued, "[e]ven where such an inference may seem strong, to draw the inference without consulting the actual legislative history seems to this court to be a cardinal error." *Id.*

of such constitutional rights in employment." *Mummelthie*, 873 F. Supp. at 1325.

Next, the court explained that its conclusion was bolstered by the legislative history of the ADEA. Senator Lloyd Bentsen, who sponsored parallel amendments to Title VII and the ADEA extending both statutes' coverage to employees of state and local governments, stated that "those principles underlying the provisions in the EEOC bill (extending Title VII to state and local employees) are directly applicable to the Age Discrimination in Employment Act." *Id.* (quoting 118 Cong. Rec. 15, 895 (1972)) (internal quotation marks omitted). The principles to which Senator Bentsen referred, according to the *Mummelthie* court, included Congress' explicit intention that the Title VII amendments would not foreclose § 1983 claims: "Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternative administrative remedy to the existing prohibition against discrimination perpetuated 'under color of state law.'" *Id.* (quoting H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin. News 2137, 2154) (internal quotation marks omitted). This analysis is consistent with the Seventh Circuit's reliance on Senator Bentsen's above-quoted comments as evidence of congressional intent regarding the ADEA. *See Kelly*, 801 F.2d at 271; *Elrod*, 674 F.2d at 607. Finally, despite Congress' awareness that

litigants framed their age discrimination claims as equal protection claims, "Congress expressed no disapproval of the practice or suggested in any way that it intended ADEA to foreclose such constitutional challenges." *Zombro,* 868 F.2d at 1374-75 (Murnaghan, J., concurring in part and dissenting in part). Instead, one committee report suggested that some members of Congress expected these constitutional challenges to continue in the future, despite doubts as to their chance of success. *Id.* at 1375. Based on the legislative history and language of the ADEA, and the statute's analogy to Title VII, the Court finds that the ADEA does not foreclose Plaintiff's equal protection claim for age discrimination under § 1983.

ii. Qualified Immunity

Defendants next move to dismiss Plaintiff's claims for damages under Counts III and IV on the basis of qualified immunity. Qualified immunity protects government officials performing discretionary functions from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sallenger v. Oakes,* 473 F.3d 731, 739 (7th Cir. 2007) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Once a qualified immunity defense is asserted, the plaintiff faces the burden of demonstrating that "the legal norms allegedly violated

by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985); *Purtell v. Mason,* 527 F.3d 615, 621 (7th Cir. 2008). The court must consider the specific facts of the case "compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law." *Rakovich v. Wade,* 850 F.2d 1180, 1209 (7th Cir. 1988), *abrogated in part on other grounds, Spiegla v. Hull,* 371 F.3d 928, 941-42 (7th Cir. 2004). The plaintiff may meet his burden by presenting "a clearly analogous case establishing a right to be free from the specific conduct at issue." *Gonzalez v. City of Elgin,* 578 F.3d 526, 540 (7th Cir. 2009). However, "the factual circumstances of the alleged violation need not be 'identical' to prior holdings in order to find an officer entitled to qualified immunity." *Rakovich,* 850 F.2d at 1209.

With respect to Count III, the Individual Defendants' qualified immunity defense must fail. In the Seventh Circuit, the law prohibiting public employers from engaging in sex discrimination in violation of the equal protection clause of the 14th Amendment is well-settled. *See Tamayo v. Blagojevich,* 526 F.3d 1074, 1090 (7th Cir. 2008) ("the right to be free from sex discrimination is clearly established"); *Nanda v. Moss,* 412 F.3d 836, 844 (7th Cir. 2005) ("It

has been plain in this circuit for quite some time that arbitrary gender-based discrimination . . . violates the equal protection clause."). Because Plaintiff's constitutional right to be free from gender discrimination is clearly established, the Individual Defendants are not entitled to qualified immunity for Plaintiff's gender discrimination claim under Count III.

In contrast, whether the Seventh Circuit permits equal protection claims for age discrimination in light of the ADEA is unclear. Indeed, this Court's lengthy analysis of the availability of such claims demonstrates that the law is not clearly established. As discussed above, neither the Supreme Court nor the Seventh Circuit has addressed whether the ADEA precludes claims for age discrimination under § 1983, and the authority on this issue from other courts is deeply divided. Because the availability of Plaintiff's equal protection claim for age discrimination is not clearly established, Defendants are entitled to qualified immunity with respect to Count IV. The Court therefore dismisses Plaintiff's equal protection claim for damages for age discrimination under Count IV.

Finally, Plaintiff's claims for injunctive relief against the Individual Defendants in Counts III and IV must be dismissed, as "section 1983 does not permit injunctive relief against state officials sued in their individual as

distinct from their official capacity." *Greenawalt v. Ind. Dep't of Corr.*, 397 F.3d 587 (7th Cir. 2005).

d. First Motion to Dismiss by Defendants Lisa Madigan, Illinois Attorney General, the Office of the Illinois Attorney General, and the State of Illinois

i. Proper Defendants in Counts I & II

Defendants introduce several arguments aimed to eliminate improperly named parties from Plaintiff's complaint. First, the Entity Defendants argue that the State of Illinois should be dismissed from Counts I and II because it is not an "employer." Although Defendants address their argument only to the definition of "employer" under Title VII, they seek dismissal of the State of Illinois as a defendant from both Plaintiff's Title VII and ADEA claims. The Court therefore construes Defendants' motion to dismiss as arguing that the State is not an "employer" under either Title VII or the ADEA. In any event, Title VII and the ADEA "use virtually the same definition of 'employer,' " and courts' interpretations of a definition in one statute are persuasive in interpreting the same definition in the other statute. *Williams v. Banning*, 72 F.3d 552, 553-54 (7th Cir. 1995); *see also E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 (7th Cir. 1995) (employer definitions under the ADEA and Title VI are

"essentially interchangeable"). Accordingly, the case law Defendants cite regarding the definition of "employer" under Title VII informs the Court's understanding of the same term in the ADEA.

Moving for the State's dismissal from Counts I and II, Defendants point to the Seventh Circuit's decision in *Hearne v. Bd. of Educ. of City of Chicago*, which held that, in Title VII suits against state entities, the term "employer" "is understood to mean the particular agency or part of the state apparatus that has actual hiring and firing responsibility." 185 F.3d 770, 777 (7th Cir. 1999); *see also Holman v. Indiana,* 211 F.3d 399, 401 n.1 (7th Cir. 2000). The court in *Hearne* dismissed the State, among other defendants, because only the Board of Education had the power to hire and fire employees. *Hearne,* 185 F.3d at 777. Defendants claim that, here, the Office of the Attorney General, rather than the State of Illinois, has the power to hire and fire Assistant Attorneys General, and therefore the State is not an "employer" under Title VII or the ADEA. In response, Plaintiff contends that Defendants' argument overlooks the distinction between an Illinois constitutional officer, on the one hand, and municipal corporations, local body politics, or agencies of another State, on the other. Plaintiff cites no case law explaining the significance of this distinction, and the Court has uncovered no such authority. The Court therefore concludes that the State of Illinois is not an "employer"

under Title VII or the ADEA and grants Defendants' motion to dismiss the State of Illinois as a defendant under Counts I and II.

Defendants next argue that Plaintiff's claims under Counts I and II against Lisa Madigan, in her official capacity, and the Office of the Attorney General are redundant, and therefore Plaintiff's claims against Lisa Madigan in her official capacity should be dismissed. A suit against an official in her official capacity is actually a suit against the government entity. *See Kentucky v. Graham,* 473 U.S. 159, 165-67 (1985); *Jungels v. Pierce,* 825 F.2d 1127, 1129 (7th Cir. 1987) ("the complaint names the mayor as a defendant in his official capacity only, which is the equivalent of suing the city"); *Knox v. Metro. Water Reclamation Dist.,* No. 06 C 1158, 2007 WL 1805334, at *4-5, 2007 U.S. Dist. LEXIS 44704, at *13 (N.D. Ill. June 20, 2007). Where the plaintiff names the government entity as a defendant in the suit, the claim against the individual in her official capacity is redundant. *See Kielbasa v. Ill. E.P.A.,* No. 02 C 4233, 2003 WL 880995, at *3 (N.D. Ill. Mar. 2, 2003) (dismissing claims against the agency's director in her official capacity as redundant to claims against the agency); *Berry v. Ill. Dep't of Human Servs.,* No. 00 C 5538, 2001 WL 111035, at *8 (N.D. Ill. Feb. 2, 2001) (since state agency is a defendant, claims against state officials in their official capacities were redundant and therefore dismissed). Here, Plaintiff's Title VII and

ADEA claims against Lisa Madigan in her official capacity and the Office of the Attorney General are redundant. Therefore, the Court grants Defendants' motion to dismiss Plaintiff's claims against Lisa Madigan in her official capacity under Counts I and II.

ii. Plaintiff's Prayer for Relief in Counts I & II

Next, the Entity Defendants move to dismiss Plaintiff's claim for emotional damages in Count I, arguing that the ADEA does not provide for such a remedy. 29 U.S.C. § 626(b); *see also Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 773 (7th Cir. 2002). Plaintiff agrees, and the Court therefore dismisses Plaintiff's claim for damages for emotional distress in Count I.

The Entity Defendants also move to dismiss Plaintiff's claim for emotional damages in excess of $300,000 in Count II, arguing that damages for violations of Title VII are capped at $300,000. 42 U.S.C. § 1981a(b)(3)(D); *see also Smith v. Chicago School Reform Bd. of Trs.*, 165 F.3d 1142 (7th Cir.1999). Plaintiff does not dispute that the maximum recovery for emotional damages under Title VII is $300,000. However, without citing case law, Plaintiff argues that he should be able to request more than $300,000 from the jury, though a verdict in excess of this amount may

be reduced to conform to the statutory maximum. Because Plaintiff fails to cite a legal basis for his position, the Court dismisses his claim in Count II for emotional damages in excess of $300,000.

iii. Plaintiff's Prayer for Relief in Counts III & IV

The Entity Defendants move to dismiss Plaintiff's claims for monetary damages in Counts III and IV. Plaintiff, in response, concedes that the Entity Defendants may not be subject to suit for monetary damages under § 1983. The Eleventh Amendment prohibits private parties from filing a federal lawsuit against a state, state agency, or state official unless the state waives its Eleventh Amendment immunity by consenting to suit, or Congress unequivocally abrogates the state's immunity. *See Kroll v. Bd. of Trs. of the Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991). Illinois has not consented to suit in this case, and it is well-settled that Congress did not abrogate states' sovereign immunity when it enacted § 1983. *Quern v. Jordan*, 440 U.S. 332, 342 (1979); *see Smith v. Illinois*, No. 07 C 7048, 2009 WL 1515306, at *7 (N.D. Ill. May 27, 2009). Moreover, states, their agencies, and officials are not "persons" who may be subject to suit for damages under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 69-71 (1989); *Levenstein v. Salafsky*, 414 F.3d 767, 772 (7th Cir. 2005). Accordingly, to the

extent that Plaintiff seeks monetary damages or indemnification from the Entity Defendants under Counts III and IV, those claims are dismissed.

Ex Parte Young provides a limited exception to the doctrine of sovereign immunity by allowing parties to sue state officials, in their official capacity, for equitable relief that is prospective in nature. 209 U.S. 123 (1908). Counts III and IV of Plaintiff's first amended complaint seek declaratory and injunctive relief, including reinstatement and other prospective equitable relief. The parties agree that Plaintiff may seek reinstatement under *Ex Parte Young*. *See Kashani v. Purdue Univ.*, 813 F.2d 843, 848 (7th Cir. 1987); *Doe v. Bd. of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d 930, 941 (N.D. Ill. 2006) ("when an individual's termination or dismissal directly violates a federal constitutional or statutory guarantee, he may maintain a suit for reinstatement").

Defendants, however, take issue with Plaintiff's other requests for injunctive relief, claiming that he fails to meet the basic requirement for equitable relief under *City of Los Angeles v. Lyons* because he does not demonstrate "the likelihood of substantial and immediate irreparable injury." 461 U.S. 95, 103 (1983). Specifically, Defendants contend that, because Plaintiff is no longer employed by Defendants, he cannot show that the equitable relief he seeks would remedy an ongoing harm. If reinstatement were not a possibility,

Defendants' argument might hold merit. *See Griffith v. Pepmeyer,* No. 07-1130, 2007 WL 3407181, at *5 (C.D. Ill. Nov. 14, 2007) (holding that plaintiffs' request for an injunction prohibiting their former employer from further discrimination was moot because plaintiffs no longer worked for defendant and plaintiffs did not seek reinstatement); *Bohen v. City of East Chicago,* 622 F. Supp. 1234, 1244 (D.C. Ind.1985) (plaintiff was ineligible for reinstatement and lacked standing to obtain an injunction concerning the department where she will not work again), *rev'd on other grounds,* 799 F.2d 1180 (7th Cir. 1986). Here, however, Plaintiff requests reinstatement, and the parties agree that this request is permissible. If Plaintiff's employment is reinstated, he may indeed be subject to the same allegedly discriminatory policy that he challenges in this lawsuit. To the extent that Plaintiff seeks an injunction requiring Defendants to cease engaging in sex or age discrimination, such relief *would* remedy a harm that Plaintiff is likely to suffer again. *See Lyons,* 461 U.S. at 103. The Court therefore rejects the Entity Defendants' motion to dismiss Plaintiff's claim for injunctive relief in Counts III and IV of his first amended complaint.

CONCLUSION

For the reasons stated above, the Entity Defendants' first motion to dismiss [Dkt. 33] is granted in part and denied in part, the Individual Defendants' motion to

dismiss [Dkt. 36] is granted in part and denied in part, and the Entity Defendants' second motion to dismiss [Dkt. 58], which the Court construes as a motion for reconsideration, is denied.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
FEB 15 2013
OFFICE OF THE CLERK

No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,

Petitioners,

v.

HARVEY LEVIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

EDWARD R. THEOBALD
Counsel of Record
135 S. LaSalle Street
Suite 1920
Chicago, IL 60603
(312) 346-9246
Bears51@aol.com

Counsel for Respondent
Harvey Levin

245729

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

When Congress applied the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (ADEA) to public employers in 1974, did Congress intend to preclude Constitutional Equal Protection age discrimination claims?

PARTIES TO THE PROCEEDINGS

Petitioners Lisa Madigan, Ann Spillane, Alan Rosen, Roger Flahaven, and Deborah Hagan are defendants-appellants in the court below. Respondent Harvey Levin is the plaintiff-appellee in the court below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

OPINIONS BELOW 1

COUNTER-STATEMENT OF FACTS 1

PROCEDURAL HISTORY 3

REASONS FOR DENYING THE PETITION 5

INTRODUCTION 5

A. Congress Passed § 1983 to Enforce the Fourteenth Amendment 7

B. The Seventh Circuit Decision Presents a Thorough and Compelling Rationale for its Holding, and is Not in Conflict With This Court 10

1. The Seventh Circuit Correctly Applied This Court's Decision in *Fitzgerald v. Barnstable Sch. Comm.* 10

Table of Contents

Page

2. It is Counterintuitive to Believe That in 1974 Congress Intended to Bar Constitutional Equal Protection Age Claims as There is No Support for Preclusion in the ADEA Text and Legislative History 11

3. Rights and Protections Between the ADEA and Equal Protection Clause Demonstrate Complementary Methods of Challenging Age Discrimination In Public Employment.....15

4. No Qualified Immunity.....17

C. There Does Not Exist a Widespread Circuit Conflict 18

1. Three out of Four Circuit Decisions Were Decided Prior to *Kimel v. Florida Bd. Of Regents* 19

2. The Ninth Circuit Overlooked *Fitzgerald v. Barnstable Sch. Comm.* 22

3. Subsequent Decisions Following the Seventh Circuit's Opinion are Capable of Resolving Any Dispute Given the Decisions in *Kimel* and *Fitzgerald.* 23

Table of Contents

Page

4. This Court Correctly Declined to Review Title VII Preclusion of § 1983 Equal Protection Claims This Term 25

5. § 1983 Equal Protection Age Discrimination Claims Are Infrequent. . . . 25

D. This Case is Not an Ideal Vehicle for Review . . . 26

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

CASES

Ahlmeyer v. Nevada Sys. of Higher Educ.,
555 F.3d 1051 (9th Cir. 2009) 22, 23

Ahlmeyer v. Nevada Sys. of Higher Educ.,
3:05-CV-0557, 2006 U.S. Dist. Lexis 8665
(J. Reed D. Nev. February 16, 2006) 22

Americanos v. Carter,
74 F.3d 138 (7th Cir. 1996) 16

Beardsley v. Webb,
30 F.3d 524 (4th Cir. 1994) 20

Booth v. Maryland,
327 F.3d 377 (4th Cir. 2003) 20

Branch v. Smith,
538 U.S. 254 (2003) 9

Brown v. GSA,
425 U.S. 820 (1976) 24

Christie v. Marston,
451 F. Supp. 1142 (N.D. Ill. 1978) 24

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 26

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 9

Cited Authorities

Page

Dellmuth v. Muth,
491 U.S. 223 (1989) 9

Dimmig v. Wahl,
983 F.2d 86 (7th Cir. 1993) 16

Discovery House, Inc. v. Consolidated City of Indianapolis,
319 F.3d 277 (7th Cir. 2003) 26

Drake v. City of Fort Collins,
927 F.2d 1156 (10th Cir. 1991) 22

Fitzgerald v. Barnstable School Committee,
555 U.S. 246 (2009) ..... *passim*

Gault v. Garrison,
569 F.2d 993 (7th Cir. 1977), *cert. denied*,
440 U.S. 945 (1979) 18

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 17

Gregory v. Ashcroft,
501 U.S. 452 (1991) 13-14, 17

Guardians Association v. Civil Service Commission,
463 U.S. 582 (1983) 6, 9

Haag v. Bd. of Educ.,
655 F. Supp. 1267 (N.D. Ill. 1987) 19

Cited Authorities

Page

Heck v. City of Freeport,
985 F. 2d 305 (7th Cir. 1993).....16

Henley v. Brown,
686 F.3d 634 (8th Cir. 2012), *cert. denied*,
184 L. Ed. 2d 659 (January 7, 2013) 25

Hernandez v. O'Malley,
98 F.3d 293 (7th Cir. 1996).....16

Jackson v. City of Atlanta,
73 F.3d 60 (5th Cir. 1996).....21

Johnson v. Railway Express Agency, Inc.,
421 U.S. 454 (1975) 6, 9

Keller v. Prince George's County,
827 F.2d 952 (4th Cir. 1987).....20

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) ..... *passim*

Kolz v. Bd. of Educ. of the City of Chicago,
No. 77-C-2548, 1978 U.S. Dist. Lexis 14464
(N.D. Ill. J. Crowley Nov. 8, 1978)..... 18-19

Lafleur v. Tex. Dep't of Health,
126 F.3d 758 (5th Cir. 1997)..... 20, 21, 22, 23

Livas v. Petka,
711 F.2d 798 (7th Cir. 1983).....16

Cited Authorities

Page

Massachusetts Bd. of Retirement v. Murgia,
427 U.S. 307 (1976) 14, 17, 21, 26

McCann v. City of Chicago,
1991 U.S. Dist. Lexis 83
(N.D. Ill. J. Grady 1991) 19, 24

McNeese v.
Bd. of Educ. for Cmty. Unit Sch. Dist. 187,
373 U.S. 668 (1963) 8

Middlesex Cnty. Sewerage Auth. v.
Nat'l Sea Clammers Ass'n,
453 U.S. 1 (1981) 11, 12-13, 24

Migneault v. Peck,
158 F.3d 1131 (10th Cir. 1998) 21, 22

Miller v. Clinton,
687 F.3d 1332 (D.C. Circuit, 2012) 10

Mitchum v. Foster,
407 U.S. 225 (1972) 8

Monroe v. Pape,
365 U.S. 167 (1961) 8

Morton v. Mancari,
417 U.S. 535 (1974) 10

Mummelthie v. City of Mason,
873 F. Supp. 1293 (N.D. Iowa 1995) 24

Cited Authorities

Page

Mustafa v. State of Neb. Dep't of Corr. Servs.,
196 F. Supp. 2d 945 (D. Neb. 2002) 24

Notari v. Denver Water Department,
971 F.2d 585 (10th Cir. 1992) 22

Opp v.
Office of the State's Attorney of Cook Cnty.,
630 F.3d 616 (7th Cir. 2010) 16

Owen v. City of Independence, Mo.,
445 U.S. 622 (1980).....16

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 6, 9

Preiser v. Rodriguez,
411 U.S. 475 (1973) 12

Rancho Palos Verdes, Cal v. Abrams,
544 U.S. 113 (2005) 10-11, 13, 24

Randolph v. IMBS, Inc.,
368 F.3d 726 (7th Cir. 2004).....9

Romer v. Evans,
517 U.S. 620 (1996) 26

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 10

Cited Authorities

Page

Runyon v. McCrary,
427 U.S. 160 (1976) 6, 9

Smith v. Robinson,
468 U.S. 992 (1984) 11-12, 13

St. Martin Evangelical Lutheran Church v. South Dakota,
451 U.S. 772 (1981) 9

Trigg v. Fort Wayne Cmty. Sch.,
766 F.2d 299 (7th Cir. 1985) 24

Upton v. Thompson,
930 F.2d 1209 (7th Cir. 1991) 16

Van Arsdel v. Indiana Util. Regulatory Comm'n,
No. IP 88-384-C, 1990 U.S. Dist. Lexis 13936
(S.D. Ind. Mar. 9, 1990) 19

Vance v. Bradley,
440 U.S. 93 (1979) 14, 17, 21, 26

Western Air Lines, Inc. v. Criswell,
472 U.S. 400 (1985) 14

Zombro v. Baltimore City Police Dept.,
868 F.2d 1364 (4th Cir. 1989) ..... *passim*

Page

STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. V 24

U.S. Const. amend. XI 16

U.S. Const. amend. XIV ..... *passim*

U.S. Const. amend. XIV, § 5 8

U.S. Const. amend XIV,
Equal Protection Clause ..... *passim*

20 U.S.C. § 1400 12

28 U.S.C. § 2254 12

29 U.S.C. § 621 8

29 U.S.C. § 630(f) 3

42 U.S.C. § 1681 ..... 8, 15, 16, 21

42 U.S.C. § 1981 6

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 12

42 U.S.C. § 2000(e) ..... *passim*

Cited Authorities

Page

42 U.S.C. § 2000e-2 2

42 U.S.C. § 2000e(f) 3

42 U.S.C. § 12101 8

Sup. Ct. R. 10 7

Seventh Circuit Rule 40(e) 5

OPINIONS BELOW

The opinion of the Seventh Circuit court of appeals is reported at 692 F.3d 607 (7th Cir. 2012) and reproduced at Pet. App.1a-37a. The decision of district court Judge Edmond Chang denying petitioners' ADEA preclusion argument and denying qualified immunity is not reported but reproduced at Pet. App 38a-102a. The earlier district court opinion of Judge David Coar granting qualified immunity is reported at 697 F. Supp. 2d 958 (N.D. Ill. 2010) and reproduced at Pet. App.103a-141a. The Seventh Circuit held that Congress did not intend the ADEA to preclude Equal Protection age discrimination claims, thus Respondent was authorized to bring this action under the Equal Protection Clause by and through 42 U.S.C. § 1983. Pet. App. 34a. The Seventh Circuit, citing *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 83 (2000), held Mr. Levin's §1983 Equal Protection age discrimination claim was clearly established and petitioners-defendants were not entitled to qualified immunity. Pet. App. 36a-37a.

COUNTER-STATEMENT OF FACTS

Plaintiff-Respondent, Harvey Levin, is male and is now 67 years old. On September 5, 2000, the Illinois Attorney General hired respondent as an Assistant Attorney General. In 2002, the respondent was promoted to Senior Assistant Attorney General. Pet. App. 3a.

Throughout the years that respondent was in the Office of the Attorney General his job performance consistently met or exceeded his employer's job expectations. Specifically, respondent was consistently evaluated as "meets expectations" or "exceeds expectations," in all categories of his written performance reviews. In his

performance evaluations, respondent Harvey Levin was described as "a top rate experienced litigator" who was "of great help to all in the Bureau." ....Levin exhibited "outstanding performance on the executive committees of the Firestone . . . multi state cases." .... "Excellent attorney who is always willing to assist others in the Bureau." Pet. App. 3a, 44a-45a.

On May 12, 2006, petitioners Illinois Attorney General, Lisa Madigan and Ann Spillane, Chief of Staff, knowingly instructed co-petitioners Alan Rosen and Roger Flahaven, to meet with respondent Harvey Levin and intentionally terminate Mr. Levin's employment and two other males over the age of 50 years old in Mr. Levin's bureau. (D.C.R[1].16) On May 12, 2006, petitioners Alan Rosen and Roger Flahaven summoned respondent, and without explanation, intentionally terminated respondent, Harvey Levin, at the urging of petitioners Madigan, Spillane and Deborah Hagan. Respondent Levin was 61 years old at the time. (D.C.R.16)

Petitioners did not terminate the employment of similarly situated substantially younger female employees whose work performance was inferior, and knowingly hired a substantially younger female to replace respondent and hired substantially younger individuals to replace the other two males in respondent's bureau who were discharged. As a result of petitioners' intentional discriminatory conduct, respondent suffered damages. (D.C.R.16)

Respondent timely filed age and sex discrimination charges with the EEOC and exhausted administrative remedies required by Title VII, 42 U.S.C. Sec. 2000e-2 *et*

1. District Court Record hereinafter "D.C.R."

seq., and the ADEA. Respondent's four count complaint consisted of a count under the ADEA, a count under Title VII, and two counts under the Equal Protection Clause of the Fourteenth Amendment of age and sex discrimination by §1983. (D.C.R.1,16).

PROCEDURAL HISTORY

On November 26, 2007, petitioners filed motions to dismiss claiming, *inter alia*, qualified immunity on the age and sex discrimination claims under the Equal Protection clause. Pet. App. 4a.

On March 10, 2010, district court Judge David Coar denied petitioners' motions to dismiss and denied petitioners' claims of qualified immunity to respondent's Equal Protection sex discrimination claim, and also denied petitioners' claim that Congress, in 1974 applying the ADEA to the public sector, intended to preclude all §1983 Equal Protection age discrimination actions. However, Judge Coar erroneously granted qualified immunity on respondent's §1983 age discrimination claim based upon the lack of unanimity of decisions on petitioners' preclusion argument. Pet. App. 5a.

On July 12, 2011, district court Judge Edmond E. Chang revisited and reversed retired Judge Coar's March 10, 2010 order granting qualified immunity. Judge Chang dismissed respondent's statutory claims under Title VII and the ADEA and held that respondent was on the "policy-making level" and therefore "exempt." [2] Pet. App. 5a-7a.

---

2. The exemptions from Title VII, 42 U.S.C. § 2000 e(f) and the ADEA, 29 U.S.C. § 630(f) are identical.

On July 12, 2011, District Court Judge Edmond Chang denied summary judgment on respondent's §1983 Equal Protection claims for damages for sex and age discrimination. Judge Chang held that respondent presented sufficient evidence that he was performing his job satisfactorily to support an inference that petitioners did not honestly believe that his performance was deficient. This created a causal link between the Constitutional violations of sex and age discrimination in violation of the Equal Protection Clause. Thus, petitioners were not entitled to qualified immunity in that petitioners' conduct in terminating respondent's employment on May 12, 2006 violated clearly established Constitutional rights to be free from intentional sex and age discrimination of which a reasonable person would have known. Pet. App. 68a-102a.

Petitioners filed a piece-meal appeal of the district court's denial of qualified immunity on respondent's Equal Protection age discrimination claim but not on the denial of qualified immunity on respondent's Equal Protection sex discrimination claim. Pet. App. 2a.

Notwithstanding the outcome of this petition, respondent's remaining Equal Protection claim of sex discrimination will go to trial, and all claims of age discrimination for injunctive relief under the Equal Protection clause by and through §1983 against all petitioners-defendants and the Office of the Illinois Attorney General and Lisa Madigan, in her official capacity. (D.C.R. 268-269, 302) The jury trial in this case is scheduled for May 6, 2013 before district court Judge Edmond Chang, and the petitioners have not sought a stay. (D.C.R.302)

REASONS FOR DENYING THE PETITION

INTRODUCTION

Review is not warranted as the answer to the "question presented" is found in two Supreme Court decisions. In *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), this Court held that in cases in which the §1983 claim alleges an independent Constitutional Equal Protection violation, and where the contours of such rights and protections diverge in significant ways from statutory rights, it is not likely that Congress intended to preclude §1983 suits enforcing constitutional rights. In *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000), this Court held that the ADEA, 29 U.S.C. §621, et. seq. is not responsive to, or designed to prevent, unconstitutional behavior based upon age discrimination.

The Seventh Circuit affirmed the district court's judgment that when Congress applied the ADEA to public employment in 1974, it did not intend to preclude §1983 Equal Protection age discrimination claims. It was clearly established that the *Equal Protection Clause of the Fourteenth Amendment* forbids arbitrary age discrimination, *see Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 83-84 (2000), and thus, qualified immunity did not apply, and Mr. Levin had established a genuine issue of material fact such that his §1983 age discrimination claim shall proceed to trial. Pet. App. 1a-37a. Pursuant to Seventh Circuit Rule 40 (e), the opinion was circulated before release to all active judges, with no judge favoring a hearing en banc. Pet. App. 23a. Petitioners now seek review of this unanimous judgment of the Seventh Circuit.

Petitioners do not raise a frequently recurring question nor is there a "growing" nationwide split in authority whether Congress in 1974 intended to eliminate §1983 Equal Protection age discrimination claims when Congress applied the ADEA to public employment.

For more than 35 years, courts in the Seventh Circuit have consistently held that §1983 Equal Protection claims of intentional age discrimination in employment stated a clearly established Constitutional right. Likewise, this Court has consistently declined to find that Congress enacting twentieth century civil rights statutes, such as the ADEA, intended to precluded §1983 claims based on Constitutional violations, such as here, age discrimination in violation of the Equal Protection Clause. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (Title VII and §1981); *Runyon v. McCrary*, 427 U.S. 160 (1976) (Title II and §1981); *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983) (Title VI and §1983); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)(Title VII and §1981). This Court's decisions in *Kimel v. Fla. Bd. Of Regents, supra,* and *Fitzgerald v. Barnstable School Committee,* 555 U.S. 246 (2009), are clear authority for lower courts that Congress in 1974 did not intend to preclude §1983 age discrimination Equal Protection claims.

The circuits holding that the ADEA precluded §1983 age discrimination actions based upon the Equal Protection Clause are decades old decisions, and distinguishable, as they did not examine Congressional intent in 1974 or predated this Court's decision in *Kimel v. Florida Bd. Of Regents, supra.* or overlooked *Fitzgerald v. Barnstable Sch. Comm., supra.*, and thus, are discredited.

Petitioners have presented no compelling reasons why a Writ of Certiorari (Petition) should be granted. Sup. Ct. R. 10. Specifically, petitioners have failed to demonstrate that the Seventh Circuit's opinion conflicts with a decision of this Court. There is not a substantial wide, deep, and persistent conflict among the Circuits, as the Seventh Circuit decision adhered to this Court's decisions in *Kimel* and *Fitzgerald*, and disagreed with petitioners' decades old faulty consensus view, and that disagreement does not warrant review.

This case is also a poor vehicle for certiorari because petitioners would receive little benefit. They have not appealed the sex discrimination claim. Regardless of the outcome of this petition for certiorari, this case will go to trial. No one can be sure of the outcome of the trial and, thus, petitioners now seek interlocutory review of a question that might be unnecessary after the case proceeds to final judgment. Given the benefits of further litigation in the lower courts and the absence of need for immediate review (especially where the decision below correctly followed this Court's decisions), this Court should deny the petition and permit the case to be litigated to final judgment on May 6, 2013. Accordingly, this case does not warrant review by this Court, and the Petition should be denied.

A. Congress Passed §1983 to Enforce the Fourteenth Amendment

In 1868, the Fourteenth Amendment was ratified by the states and in 1871, §1983 was enacted to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.

This Court has recognized that §1983 was enacted as an exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce the Amendment's provisions. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961). Since then, the statute has served as a mechanism for vindicating the Fourteenth Amendment's core guarantees, in particular, the guarantee of Equal Protection of the law and freedom from discrimination under color of state law. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Section 1983's application is guided by the strong presumption that later-enacted statutes do not preclude relief previously available under §1983. This approach also governed the assessment of twentieth century civil rights statutes, which generally have not displaced the rights or remedies provided by their nineteenth-century precursors. The premise underlying §1983 is that Constitutional rights must be enforceable, even where other sources of law also offer protection, and even where protections overlap. *See Monroe*, 365 U.S. at 172-74.

Section 1983 has long been recognized to provide a remedy in the federal courts *supplementary* to any remedy any State might have. *See McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist.187*, 373 U.S. 668, 672 (1963)(challenge to segregated schools in Illinois). Here, there is no indication that Congress intended for this Constitutional remedy to disappear wherever another remedy is available.

Twentieth century federal anti-discrimination statutes such as Title VII, 42 U.S.C. §2000(e), *et seq.*, Title IX, 42 U.S.C. §1681, *et seq.*, the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, and the Age Discrimination In Employment Act, 29 U.S.C. §621, *et seq.*

require complaints to be initiated at the EEOC, whereas, Equal Protection claims under §1983 may be filed directly in court. *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 730-732 (7th Cir. 2004).

These differences in administrative exhaustion have led to government employers' contentions that in enacting twentieth century civil rights statutes, Congress intended to preclude Constitutional claims brought through §1983 as they may occupy the same ground. However, the Seventh Circuit held, "*arguments of that kind have never succeeded*," which have been reinforced by this Court's holdings that both old and newer civil rights actions may be enforced according to their terms, despite substantial differences. (emphasis added) *See Randolph v. IMBS, Inc.*, 368 F.3d at 732 citing *Johnson v. Railway Express Agency, Inc., supra. Runyon v. McCrary, supra.; Guardians Association v. Civil Service Commission, supra.; Patterson v. McLean Credit Union, supra.*

Moreover, the propriety of permitting respondent's parallel claims is bolstered by this Court's precedent disfavoring repeals by implication. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). There must be "irreconcilable conflict" between two statutes in order to find that the later statute precluded the earlier one. *Branch v. Smith*, 538 U.S. 254, 273, (2003); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788, (1981). "Evidence of congressional intent [to preclude] must be both *unequivocal and textual.*" *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (emphasis added). Congress knows how to limit statutes when it wishes to do so. "When that is Congress' purpose, it makes its intention clear by using language that makes express exceptions from those statutes or expressly permits the

making of distinctions those statutes would otherwise prohibit." *See Miller v. Clinton*, 687 F.3d 1332, 1339 (D.C. Circuit, 2012).

Where, as here, two remedies are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017, (1984); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, the rights and contours of the ADEA and the Equal Protection Clause are not irreconcilable, but complementary methods of fighting age discrimination. No review by this Court is warranted.

B. The Seventh Circuit Decision Presents a Thorough and Compelling Rationale for its Holding, and is Not in Conflict With This Court

1. The Seventh Circuit Correctly Applied This Court's Decision in *Fitzgerald v. Barnstable Sch. Comm.*

The Seventh Circuit's decision applied a correct and straight forward end to any inquiries whether in 1974 Congress intended the ADEA to preclude §1983 Equal Protection age discrimination claims. Pet. App. 1a-37a. In determining whether a §1983 Equal Protection claim was precluded, the Seventh Circuit held that the most important consideration in determining preclusion depended on congressional intent. The Seventh Circuit followed this Court's decisions that hold Congressional intent may be inferred from the language of the statute and legislative history, citing *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), the statute's context, *Rancho Palos*

Verdes, Cal v. Abrams, 544 U.S. 113, 127 (2005) (Breyer, J., concurring), the nature and extent of the remedial scheme, *Middlesex Cnty. Sewerage Auth. V. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981), and a comparison of the rights afforded by the statutory scheme versus a § 1983 claim, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. at 252. Pet. App. 17a.

2. It is Counterintuitive to Believe That in 1974 Congress Intended to Bar Constitutional Equal Protection Age Claims as There is No Support for Preclusion in the ADEA Text and Legislative History

The Seventh Circuit examined the text and the legislative history of the ADEA to hold that Congress did not intend to preclude Constitutional Equal Protection age discrimination claims. Pet. App.23a-32a. Unbelievably, petitioners argue at page 18 of their Petition that the Seventh Circuit "required something more" than the usual analysis used to determine preclusion. Remarkably, petitioners argue that omission of any Congressional statement of intent and the lack of reference or mention of the Constitution, or to §1983, or to the Equal Protection Clause, or to the ADEA being the exclusive means to challenge age discrimination in employment, actually or "really" means that Congress intended the opposite: that enacting the ADEA was meant to preclude Constitutional Equal Protection age discrimination claims. However, petitioners have misinterpreted "sounds of silence."

In cases where this Court found preclusion, "silence" was not the basis. Rather, express Congressional intent to preclude was clearly expressed. This Court in *Smith*

v. Robinson, 468 U.S. 992 (1984), held that petitioners who had prevailed on claims under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, could not obtain attorneys' fees pursuant to 42 U.S.C. §1988 on claims advanced through §1983. *Id.* This Court examined the EHA's text and legislative history, which stated that Congress intended for the statutory framework to "provide assistance to the States in carrying out their responsibilities *under . . . the Constitution of the United States to provide Equal Protection of the laws.*" *Smith*, 468 U.S. at 1010. (emphasis added). Unlike *Smith*, the ADEA contains no clear express statement that it was intended to bar §1983 Equal Protection claims. Pet. App. 11a-12a, 26a-27a.

Likewise, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court held that state prisoners could not assert claims through §1983 because Congress had enacted the federal *habeas corpus* statute, 28 U.S.C. §2254, which specifically referred to the Constitution and provided a remedy to challenge inmates' custodial status "*in violation of the Constitution...*" *Id.* (emphasis added).

The Seventh Circuit noted in both *Smith and Preiser*, "the statutes at issue were specifically designed to address Constitutional issues." Pet. App. 26a. However, in contrast to the statutes at issue in *Preiser* and in *Smith*, the ADEA does not provide a remedy for a violation of Constitutional rights. "Instead, it provides a mechanism to enforce only the substantive rights created by the ADEA itself." *See Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1373 (4th Cir. 1989)(Murnaghan, J., concurring in part and dissenting in part). Pet. App. 27a. The Seventh Circuit held that *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1,

20 (1981) and *Rancho Palos Verdes, Cal v. Abrams*, 544 U.S. 113, 127 (2005) differ from *Smith*, as those cases were tasked with determining whether §1983 actions to enforce statutory claims were precluded by that statute's own comprehensive scheme. Pet. App. 28a. Simply put, the existence of a comprehensive remedial scheme in the ADEA would preclude a suit only if the §1983 claim was only based on the statutory provisions created by the ADEA. *See Zombro*, 868 F.2d at 1372; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. at 20. Here, respondent's age discrimination claim is based upon a right independent of the ADEA – the Equal Protection Clause.

It is counterintuitive to believe that in 1974, Congress intended to prohibit the historic use of § 1983 to vindicate Constitutional wrongdoing by enacting the ADEA since there is nothing in the text of the ADEA which expressly precludes a §1983 claim or even addresses Constitutional rights. *Zombro*, 868 F.2d at 1374. There is no evidentiary support in the legislative record for the argument that Congress in 1974 intended to abolish clearly established rights for violations of the Equal Protection Clause by enacting legislation that greatly expanded civil rights to public employees based on their age. Pet. App. 23-34a.

This is especially so, considering this Court's decision in *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000) which squarely addressed this issue and held that the ADEA and the Fourteenth Amendment's Equal Protection Clause diverge in very significant ways:

> "We have considered claims of unconstitutional age discrimination under the Equal Protection Clause three times." *See Gregory v. Ashcroft*,

501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307 (1976). *Kimel v. Florida Bd. Of Regents*, 528 U.S. at 83.

States may discriminate on the basis of age without offending the *Fourteenth Amendment* if the age classification in question is rationally related to a legitimate state interest." *Kimel v. Florida Bd. Of Regents*, 528 U.S. at 83.

Petitioners' reliance on the "bona fide occupational qualification" (BFOQ) defense [in the ADEA] is misplaced. ... *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), conclusively demonstrates that the defense is a far cry from the rational basis standard *we apply to age discrimination under the Equal Protection Clause. Kimel v. Florida Bd. Of Regents*, 528 U.S. at 86. (emphasis added)

Judged against the backdrop of our Equal Protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel v. Florida Bd. Of Regents*, 528 U.S. at 86.

The ADEA is not responsive to the Constitution and it cannot supersede the Equal Protection clause. There is no support in the statutory text or the legislative history that support the proposition that the ADEA precludes a §1983 Equal Protection claim for age discrimination. Pet. App.

23a-31a. This explains why petitioners attempt to skip over the text and legislative history of the ADEA and jump straight to its "remedial scheme." However, petitioners' argument that the Seventh Circuit erred when the court examined the actual text and legislative history is without merit and contrary to this Court's jurisprudence.

3. Rights and Protections Between the ADEA and Equal Protection Clause Demonstrate Complementary Methods of Challenging Age Discrimination In Public Employment

Petitioners are wrong in suggesting that the Seventh Circuit misread this Court's decision in *Fitzgerald v. Barnstable Sch. Comm.* This Court held that the analysis of congressional intent to preclude a §1983 claim only enforcing a statutory right is far different from the analysis of Congressional intent to preclude a §1983 claim enforcing the Fourteenth Amendment right to Equal Protection. *Fitzgerald v. Barnstable Sch. Comm.*, supra., 555 U.S. at 259. (Title IX did not preclude §1983 Equal Protection claim). As the Seventh Circuit stated, "[g]iven the absence of any clear or manifest congressional intent in either the language of the statute or the legislative history, *Fitzgerald* directs us to compare the rights and protections afforded by the statute and the Constitution. 555 U.S. at 252." Pet. App. 32a.

Significantly, a review of the ADEA and Section 1983 claims of age discrimination through the Equal Protection Clause provide further evidence that there are complementary methods of fighting age discrimination in employment. The Equal Protection Clause by §1983 provides

rights and protections to all public sector employees, whereas the ADEA provides no rights and no protections to substantial numbers of public sector employees, and some entire offices are exempt from the protections of both Title VII and the ADEA. *Heck v. City of Freeport*, 985 F. 2d 305, 309 (7th Cir. 1993)(exemptions from protection in political patronage cases identical to exemptions from Title VII and ADEA protections); *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996)(Indiana Assistant Attorneys General exempt from Title VII and the ADEA); *Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991) and *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993)(deputy sheriffs exempt); *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983) and *Opp v. Office of the State's Attorney of Cook Cnty.*, 630 F.3d 616, 619 (7th Cir. 2010)(State's Attorneys); *Hernandez v. O'Malley*, 98 F.3d 293, 294-296 (7th Cir. 1996)(stenographers exempt). Significantly, this Court in *Fitzgerald*, held there was no Congressional intent to preclude §1983 Equal Protection sex discrimination claims brought by persons exempt from Title IX. *Id.* at 257.

Further rights and protections that are divergent between the Equal Protection Clause and the ADEA are found in: (a) public sector state employees age claims under the ADEA are barred by the *Eleventh Amendment*, whereas all public sector employees, including all "State" employees may pursue age discrimination claims under §1983 and the Equal Protection Clause, *Kimel*, 528 U.S. at 91-92; *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980); (b) the Equal Protection Clause by §1983 imposes liability on the individuals responsible for the unconstitutional conduct, whereas the ADEA imposes liability upon the employer; (c) a §1983 plaintiff may sue the governmental entity if he or she can demonstrate that the Constitutional violation was

caused by (1) a municipal policy; (2) a widespread custom, or (3) a decision-maker with policymaking authority; (d) the ADEA prohibits claims of employees under the age of forty, *Gen. Dynamics Land Sys., Inc., v. Cline*, 540 U.S. 581, 593 (2004), whereas the Equal Protection Clause does not. Pet. App. 32a-34a.

Petitioners' argument that the Seventh Circuit "misapplied" or "required something more" in its analysis regarding preclusion is without merit. The Seventh Circuit explicitly based its holding on the "ADEA's lack of legislative history or statutory language precluding Constitutional claims and the divergent rights and protections afforded by the ADEA as compared to a §1983 Equal Protection claim," citing *Fitzgerald*, 555 U.S. at 252-53. Pet. App. 1a-37a. Considering the language Congress *did use*, and the divergent rights and protections between the ADEA and §1983 Equal Protection claims, it is inconceivable to conclude that Congress in 1974 intended to preclude §1983 Equal Protection age discrimination claims.

4. No Qualified Immunity

Notably absent from the petition is the assertion that petitioners are entitled to qualified immunity. Nevertheless, the Seventh Circuit held that it was "clearly established that age discrimination in employment violates the *Equal Protection Clause*," citing *Kimel*, 528 U.S. at 83. Pet. App. 36a-37a. This Court's decisions in *Massachusetts Bd. of Retirement v. Murgia, supra.*, *Vance v. Bradley, supra.*, *Gregory v. Ashcroft, supra.*, and *Kimel* made it abundantly clear that in 2006, state employees had a clearly established Constitutional

right under the Equal Protection Clause to be free of intentional age discrimination. "Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not "rationally related to a legitimate state interest." *Kimel*, 528 U.S. at 83; Pet. App. 36a.

The Seventh Circuit and District Court Judge Chang correctly held that determining whether to grant qualified immunity does not concern whether a "particular vehicle (i.e., cause of action) is available." The Seventh Circuit held, "Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is irrelevant" to the determination of qualified immunity. Pet. App. 36a-37a. This Court should deny the Petition since what Congress intended in 1974 by applying the ADEA to public employment has absolutely nothing to do with qualified immunity - the basis of petitioners' piecemeal interlocutory appeal.

C. There Does Not Exist a Widespread Circuit Conflict

The Seventh Circuit's analysis reflects a correct and straightforward application of this Court's decisions in *Fitzgerald* and *Kimel*. Pet. 1a-37a. The Seventh Circuit decision distinguishing other circuits' decisions does not create a sufficiently widespread conflict to warrant this Court's involvement. To the extent petitioners have asserted a conflict, the conflict is limited to the Seventh, which remains constant since the 1970s. *See Gault v. Garrison*, 569 F.2d 993, 997 (7th Cir. 1977), *cert. denied*, 440 U.S. 945 (1979); *Kolz v. Bd. of Educ. of the City of Chicago*, No. 77-C-2548, 1978 U.S. Dist. Lexis 14464 at

* 4 (N.D. Ill. J. Crowley Nov. 8, 1978); *McCann v. City of Chicago*, 1991 U.S. Dist. Lexis 83 *7 (N.D. Ill. J. Grady 1991); *Van Arsdel v. Indiana Util. Regulatory Comm'n*, No. IP 88-384-C, 1990 U.S. Dist. Lexis 13936 at *2 (S.D. Ind. Mar. 9, 1990); *Haag v. Bd. of Educ.*, 655 F. Supp. 1267, 1274 (N.D. Ill. 1987).

1. Three out of Four Circuit Decisions Were Decided Prior to *Kimel v. Florida Bd. Of Regents*

The Seventh Circuit's opinion highlighted the decisions of other Circuits (Fourth, Fifth, Ninth and Tenth), that addressed the preclusion issue, and distinguished their deficiencies in relation to the subsequent Supreme Court rulings in *Kimel* and *Fitzgerald*. Pet. App. 20a-34a. Furthermore, all other circuits that have held that the ADEA provides the exclusive remedy for age discrimination in public employment mistakenly relied upon the Fourth Circuit's 1989 decision in *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1368-70 (4th Cir. 1989). However, *Zombro* is not persuasive for a variety of reasons after this Court's decisions in *Kimel and Fitzgerald*. The *Zombro* decision failed to consider the congruity of the "enforcement schemes" between Title VII and the ADEA, erred by implying preclusion from statutory and legislative "sounds of silence" and further erred by inferring Congressional intent via "Sea Clammers," instead of this Court's later analysis in *Fitzgerald* which directs the courts to compare the rights and protections afforded by the statutory claim and the Constitutional claim. *Fitzgerald*, 555 U.S. at 252. Significantly, after *Zombro* this Court squarely addressed the "rights and protections" of the ADEA and

the Equal Protection Clause, and held that the "ADEA cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel v. Florida Bd. Of Regents,* 528 U.S. at 86.

The Fourth Circuit in *Zombro,* further erred by looking to the Fair Labor Standards Act, "FLSA," enacted in 1938, and amended in 1967, 1974, and 1978 in determining ADEA exclusivity. *Zombro,* 868 F.2d at 1369. However, the Seventh Circuit found that the reliance on the FLSA in determining preclusion was a "perplexing argument because the cases which have found the FLSA to be an exclusive remedy do not (and, in fact, cannot) address Constitutional claims." The elaborate remedial scheme provided in the FLSA only demonstrates a congressional intent to prohibit §1983 actions *to enforce such FLSA rights."* (emphasis added). The Seventh Circuit held, "[w]e have no quarrel with the notion that the FLSA is the sole remedy for the enforcement of the FLSA rights, and similarly, the ADEA is the sole remedy for the enforcement of the ADEA rights." Pet. App. 30a.

In *Zombro,* the correct comparison should have been to Title VII, which has the same statutory exemptions as the ADEA, and an equally comprehensive enforcement mechanism. Tellingly, a review of the Fourth Circuit's decisions regarding Title VII demonstrate that Title VII does not preclude §1983 Equal Protection claims. *See Keller v. Prince George's County,* 827 F.2d 952, 963 (4th Cir. 1987); *Beardsley v. Webb,* 30 F.3d 524, 526 (4th Cir. 1994); *Booth v. Maryland,* 327 F.3d 377, 382 (4th Cir. 2003).

The Fifth Circuit in *Lafleur v. Tex. Dep't of Health,* 126 F.3d 758 (5th Cir. 1997), found ADEA preclusion of a §1983

claim by relying on *Jackson v. City of Atlanta*, 73 F. 3d 60, 63 (5th Cir. 1996) to dismiss a §1983 age discrimination claim that did not allege facts that would support an independent claim under §1983. The *Jackson* decision was a §1983 action *only* to enforce a statutory right, not a Constitutional right, and was properly dismissed. The court's analysis and decision in *Lafleur* is contrary to this Court's decision in *Fitzgerald* that declined to find that Title IX precluded §1983 relief when the §1983 claim is based directly on a Constitutional violation, not a statutory one. *Fitzgerald v. Barnstable Sch. Comm.*, supra., 555 U.S. at 259.

The Tenth Circuit in *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998), *abrogated on other grounds by Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); "adopted" the holding in *Lafleur* and held that the defendant was thus entitled to qualified immunity. Yet, the decision in *Migneault* should not be followed for a number of reasons in the wake of *Kimel*. The Tenth Circuit erred when it held that the ADEA's scope was "limited to the unconstitutional conduct Congress seeks to prevent" and that the ADEA was "proportional to the Constitutional violations it seeks to prohibit." *Migneault*, 158 F.3d at 1138-39; *contra Kimel*, 528 U.S. at 81-86. Second, the court erred by merging the qualified immunity analysis with implied preclusion, resulting in the granting of qualified immunity on a §1983 *Equal Protection* claim.

The Tenth Circuit decision overlooked the significance of this Court's decisions that acknowledged the right to challenge age discrimination through the Equal Protection Clause, *Bradley*, 440 U.S. 93 (1979), and *Murgia*, 427 U.S. 307 (1976), and nevertheless summarily adopted the

flawed Fourth and Fifth Circuits' decisions in *Zombro* and *LaFleur. Migneault*, at 1140. However, the Tenth Circuit's decisions regarding Title VII are illustrative. *See Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991) (plaintiff who alleges that his ...Equal Protection rights were violated, and requests remedies for those alleged violations under...[§]1983 has stated an independent basis for that claim); *Notari v. Denver Water Department*, 971 F.2d 585, 587 (10th Cir. 1992)(Title VII does not preclude §1983 Equal Protection claims).

2. The Ninth Circuit Overlooked *Fitzgerald v. Barnstable Sch.Comm.*

The most recent Circuit case which held ADEA preclusion of a §1983 action is *Ahlmeyer v. Nevada Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009), and is confusingly unexplainable. The district court in *Ahlmeyer* dismissed plaintiff's complaint, and did not allow the plaintiff to amend the complaint to allege age discrimination holding that "such an amendment would be futile." However, the same district court specifically provided that the plaintiff could file an age discrimination action *under the Fourteenth Amendment. Ahlmeyer v. Nevada Sys. of Higher Educ.*, 3:05-CV-0557, 2006 U.S. Dist. Lexis 8665 at*10, n. 2 (J. Reed D. Nev. February 16, 2006).

The Ninth Circuit did not address the district court's contradictory opinions and focused on irrelevant matters at 555 F.3d 1059, n. 8, rather than the intent of Congress when it amended the ADEA, which should be the focus of "preclusion." *Fitzgerald v. Barnstable, supra.* at 259, n. 2. Having overlooked this Court's decision in *Fitzgerald*, the Ninth Circuit stated that "every circuit who has

considered the issue has concluded similarly that the ADEA is the exclusive remedy for age discrimination claims by *federal* employees," citing, *inter alia*, *Lafleur*. However, respondent, Harvey Levin in the instant case, and the plaintiffs in *Lafleur* and *Ahlmeyer* were not federal employees. *Ahlmeyer*, 555 F.3d at 1057, n. 5.

3. Subsequent Decisions Following the Seventh Circuit's Opinion are Capable of Resolving Any Dispute Given the Decisions in *Kimel* and *Fitzgerald*.

The benefit of this Court's decisions in *Kimel* and *Fitzgerald* and the recent Seventh Circuit opinion must be allowed to percolate further in the lower courts. Allowing further percolation in light of the Seventh Circuit's opinion and this Court's opinion in *Fitzgerald* would obviate any need for this Court's review.

The District of Columbia Circuit, First, Second, Third, Sixth, Eight, and Eleventh Circuits have not addressed whether the ADEA precludes §1983 Constitutional Equal Protection claims of age discrimination in employment under the Fourteenth Amendment. Thus, the issue of ADEA preclusion is not sufficiently mature to warrant this Court's attention at this time, especially in light of this Court's decision in *Fitzgerald*. While petitioners attempt to portray the district courts in other circuits as deeply divided, Pet. page 9, a review of these decisions demonstrates that there is not a square conflict.

First, most of the district court decisions finding preclusion predate this Court's decision in *Fitzgerald*. Second, some of the cases petitioners referred to failed to

allege Constitutional Equal Protection claims, and instead are §1983 actions seeking to enforce statutory provisions of the ADEA as in *Sea Clammers and Rancho Palos Verdes.* As the Seventh Circuit held, the district courts that found §1983 Constitutional Equal Protection claims are not precluded by the ADEA agree that §1983 cannot be used to enforce the ADEA. *See Mustafa v. State of Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 956 n.13 (D.Neb. 2002) ("[S]ection 1983 cannot be used as an alternate mechanism to assert violation of the ADEA's provisions against states."); *Mummelthie v. City of Mason*, 873 F. Supp. 1293, 1317 (N.D. Iowa 1995)(no dispute that state and local employees cannot use § 1983 to enforce violations based on the provisions of the ADEA). Pet. App. 31a.

Third, a number of district court cases mistakenly confuse federal employees' attempts to circumvent the ADEA and assert §1983 Fifth Amendment challenges, neither of which pertains to respondent-plaintiff Harvey Levin's claim brought by §1983 to enforce the Equal Protection Clause of the 14th Amendment. The same district court in *Christie v. Marston*, 451 F. Supp. 1142, 1145 (N.D. Ill. 1978)(ADEA exclusive remedy for federal employee age discrimination actions) and *McCann v. Chicago*, 89 C 2879, 1991 U.S. Dist. Lexis 83 at *5 (N.D. Ill. J. Grady Jan. 3, 1991)(ADEA does not foreclose §1983 Equal Protection age discrimination actions for State and local employees) explained the exclusive remedies of Title VII and the ADEA for federal employees based on *Brown v. GSA*, 425 U.S. 820 (1976), and held that while "the ADEA was the exclusive remedy for age discrimination in federal employment, there was no basis to foreclose state and local employees from bringing Constitutional age discrimination claims under §1983." *Id. citing Trigg v. Fort Wayne Cmty. Sch.*, 766 F.2d 299, 302 (7th Cir. 1985).

4. This Court Correctly Declined to Review Title VII Preclusion of §1983 Equal Protection Claims This Term

In 1972 when Congress applied Title VII to government employers, Congress did not intend to preclude §1983 Equal Protection discrimination claims despite Title VII's comprehensive and administrative enforcement scheme and exemptions. *See Henley v. Brown*, 686 F.3d 634, 642 (8th Cir. 2012), *cert denied*, 184 L.Ed. 2d 659 (January 7, 2013). Given this Court's holding in *Fitzgerald*, the identical statutory exemptions and comprehensive and administrative enforcement schemes of the ADEA and Title VII are not sufficient to preclude §1983 Equal Protection Constitutional discrimination claims. Pet. App. 1a-37a.

5. §1983 Equal Protection Age Discrimination Claims Are Infrequent

Just as the petitioners in *Henley v. Brown*, 686 F.3d 634, 642 (8th Cir. 2012), *cert denied*, 184 L.Ed. 2d 659 (January 7, 2013), petitioners herein attempt to elevate their argument to "national significance" with an inflated estimate of 20 million state and local employees in the country being affected by this decision. However, in the past 39 years since the ADEA was applied to public employment, there have been less than 40 or so such cases – hardly supportive of proposition that this is a "frequently recurring question." To the contrary, the scarcity of §1983 Equal Protection age discrimination decisions strongly suggests that the issue does not arise with any frequency and contradicts petitioners' wildly speculative and unsubstantiated argument of plaintiffs routinely bypassing the EEOC.

The Seventh Circuit noted, "the ADEA's heightened scrutiny provides a stronger mechanism for plaintiffs to challenge age discrimination in employment..." Pet. App. 29a-30a. Whereas, §1983 Equal Protection age discrimination claims face a higher burden of proof than under the ADEA. However, this Court's decisions in *Bradley* and *Murgia* demonstrate "that the Equal Protection Clause protects against age discrimination," and Equal Protection jurisprudence is not confined to traditional suspect or quasi-suspect classifications. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996). *Bradley* and *Murgia* survived Constitutional scrutiny because the Court found that state action was rationally related to the state's "asserted" interests and *not* because distinctions based on age are exempt from Constitutional scrutiny. *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F. 3d 277, 281 (7th Cir. 2003).

Under these circumstances, the questions presented are not sufficiently important to warrant review.

D. This Case is Not an Ideal Vehicle for Review

Despite the substantially similar comprehensive schemes of Title VII and the ADEA, petitioners did not challenge Respondent's §1983 Equal Protection sex discrimination claim as being precluded by Title VII. Petitioners' concern about the "comprehensive scheme" of the ADEA and allowing plaintiffs to circumvent the enforcement or conciliatory scheme of the EEOC is not applicable in this case and highlights why this case is not the proper vehicle to challenge exclusivity. Respondent-plaintiff, Harvey Levin timely complied with EEOC

administrative prerequisites, and brought concurrent claims under Title VII, the ADEA, and the Equal Protection Clause of the 14th Amendment by §1983.

Petitioners' piece-meal interlocutory appeal does not seek review of the appealable issue of denial of qualified immunity, but rather the district court's rejection of petitioners' argument that the Congress in 1974 intended to preclude §1983 Equal Protection age discrimination claims by applying the ADEA to public employment. This case is scheduled to go to trial on May 6, 2013, at which time, the record will be fully developed and complete.

CONCLUSION

Petitioners have failed to present compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

EDWARD R. THEOBALD
Counsel of Record
135 S. LaSalle Street
Suite 1920
Chicago, IL 60603
(312) 346-9246
Bears51@aol.com

Counsel for Respondent
Harvey Levin

REPLY BRIEF

No. 12-872

In the Supreme Court of the United States

LISA MADIGAN, in her individual capacity, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,
PETITIONERS,

v.

HARVEY LEVIN,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

REPLY BRIEF FOR PETITIONERS. 1

I. The Federal Courts Are Deeply Divided, As The Seventh Circuit Recognized, And There Is No Need For Further Percolation. . . 1

II. This Case Presents An Ideal Vehicle For Resolving The Split In Authority. 5

III. Respondent's Merits Arguments Fall Short. 7

CONCLUSION. 12

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adair v. eStem Pub. Charter Schs.,
No. 4:11-cv-541-DPM, 2012 WL 474019
(E.D. Ark. Feb. 14, 2012).. 5

Ahlmeyer v. Nev. Sys. of Higher Educ.,
555 F.3d 1051 (9th Cir. 2009). 2

Ashcroft v. Iqbal, 556 U.S. 662 (2009).. 6

Blessing v. Freestone, 520 U.S. 329 (1997). 3

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005). 8

Dudley v. Lake Ozark Fire Prot. Dist.,
No. 09-4086-cv-c-NKL, 2010 WL 1992188
(W.D. Mo. May 17, 2010).. 5

Fitzgerald v. Barnstable Sch. Comm.,
555 U.S. 246 (2009). 1, 2, 3, 4

Gregor v. Derwinski,
911 F. Supp. 643 (W.D.N.Y. 1996). 5

Hamilton v. City of Springdale, Civil No. 10-5061,
2011 WL 2560258 (W.D. Ark. June 29, 2011). . . 5

Kelley v. White, No. 5:10CV00288 JMM,
2011 WL 4344180 (E.D. Ark. Sept. 15, 2011). . . 5

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000). 3, 4

TABLE OF AUTHORITIES—Continued

Lorillard v. Pons, 434 U.S. 575 (1978). 9, 10

McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668 (1963). 7, 8

Messerschmidt v. Millender, 132 S. Ct. 2088 (2012). 6

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). 3, 8

Mitchell v. Forsyth, 472 U.S. 511 (1985). 6, 7

Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978). 7-8, 8

Pearson v. Callahan, 555 U.S. 223 (2009). 6

Preiser v. Rodriguez, 411 U.S. 475 (1973). 8

Ray v. City of Opa-Locka, No. 12-CV-21769, 2012 WL 4896162 (S.D. Fla. Oct. 15, 2012). 5

Reichle v. Howards, 132 S. Ct. 2088 (2012). 6, 7

Ring v. Crisp Cnty. Hosp. Auth., 652 F. Supp. 477 (M.D. Ga. 1987). 11

Smith v. Robinson, 468 U.S. 992 (1984), superceded by statute, PL 99-372, 100 Stat. 796 (1986). 3, 9

TABLE OF AUTHORITIES—Continued

Tranello v. Frey, 758 F. Supp. 841 (W.D.N.Y. 1991), aff'd on other grounds, 962 F.2d 244 (2d Cir. 1992)..... 5

Trigg v. Fort Wayne Cmty. Schs., 766 F.2d 299 (7th Cir. 1985)..... 10

Wilkie v. Robbins, 551 U.S. 537 (2007)..... 7

Zombro v. Baltimore City Police Dep't, 868 F.2d 1364 (4th Cir. 1989)..... 11

Other:

29 U.S.C. § 626(b)..... 10

H.R. Rep. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137..... 10

Eugene Gressman *et al.*, SUPREME COURT PRACTICE (9th ed. 2007)..... 6

REPLY BRIEF FOR PETITIONERS

As the certiorari petition showed, and the Seventh Circuit recognized, the federal courts are intractably divided over the question presented. Moreover, the issue is an important one requiring this Court's immediate intervention, as the *amici* supporting the petition also make clear. Finally, the decision below arises from a misreading of Supreme Court precedent.

Respondent offers no meaningful rebuttal to any of these points. He devotes his brief largely to the merits of the question presented, without challenging the presence of a circuit split. Nor is there anything to respondent's claim that *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), announced a new rule demanding further percolation in the lower courts. His claim that this appeal presents a poor vehicle for resolving the question presented likewise falls short, as does his extended discussion of the merits.

I. The Federal Courts Are Deeply Divided, As The Seventh Circuit Recognized, And There Is No Need For Further Percolation.

Respondent cannot, and does not, dispute that four circuits—the Fourth, Fifth, Ninth, and Tenth—squarely hold that the ADEA displaces equal protection claims under § 1983 for alleged age discrimination in state and municipal employment. See Pet. 8. Nor does he dispute that the First and District of Columbia Circuits have announced the same rule for federal employees, with the suggestion that it would extend to state and municipal workers as well. See *ibid.* The Seventh Circuit, in fact, described all six of these circuits as at odds with its holding below. See Pet. App. 20a.

1. Respondent offers two points in rebuttal, but neither supports his request to deny the petition. He

first contends that these circuits, at least the four to address the issue squarely, are wrong on the merits. See Br. in Opp. 19-23. But that is not a ground to deny certiorari review; rather, it is an argument for affirming the judgment below should this Court grant review.

2. Respondent's second point is that this Court's 2009 decision in *Fitzgerald* so changed the law in this area that only decisions rendered after *Fitzgerald* may be counted as part of the split—that is, only the Ninth Circuit's decision in *Ahlmeyer v. Nevada System of Higher Education*, 555 F.3d 1051 (2009), and the Seventh Circuit's contrary decision here. But this response also misses the mark. Even on its own terms, it leaves a one-to-one circuit split over the question presented, and it ignores that, of the fourteen district court decisions cited in the petition as favoring the Fourth/Fifth/Ninth/Tenth Circuit rule, seven were decided after *Fitzgerald*. See Pet. 9-12.

More fundamentally, respondent's reliance on *Fitzgerald* fails because that decision does not purport to change the relevant legal standard at all, much less to announce the new rule that respondent describes. To be sure, *Fitzgerald* acknowledges that, "[i]n cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent [to displace that claim] may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." 555 U.S. at 252. But as the petition showed, *Fitzgerald*'s description of substantive differences between Title IX and § 1983 equal protection claims merely served as "further support" for the Court's conclusion earlier in the opinion that equal

protection claims survive Title IX because the latter lacks the comprehensive remedial regime required to displace § 1983 claims under *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984), superceded by statute, PL 99-372, 100 Stat. 796 (1986). See Pet. 19. In fact, *Fitzgerald* reaffirmed the Court's longstanding rule that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, we have placed primary emphasis on the nature and extent of that statute's remedial scheme," and that this "focus[] on the statute's detailed remedial scheme" applies even when displacing constitutional claims. 555 U.S. at 253-254.

Accordingly, *Fitzgerald* did nothing to change the rule from *Sea Clammers*, *Smith*, and their progeny that Congress may displace a § 1983 remedy either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, *by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983*." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (emphasis added). The distinction that respondent proposes between pre- and post-*Fitzgerald* case law is therefore artificial, and it neither reduces the magnitude of the deepening split in authority nor calls for further percolation.

The same goes for *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), on which petitioner also relies. *Kimel* held that the ADEA fails to abrogate States' Eleventh Amendment immunity because the Act's broad sweep, "and the lack of evidence of

widespread and unconstitutional age discrimination by the States," meant that "the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment." *Id.* at 91. Having misread *Fitzgerald* to announce a rule—that whether a federal statute displaces constitutional claims under § 1983 turns on whether the statute and the constitutional right provide different protections—respondent then relies on *Kimel* for its observation that the ADEA is on the whole more protective of government employees than the Equal Protection Clause. See Br. in Opp. 5, 13-14. As shown above, however, respondent misstates *Fitzgerald*'s holding, and his reliance on *Kimel* is therefore equally misplaced.

3. Finally, respondent fails in his effort to downplay the split among federal district courts, see Br. in Opp. 23-24, a split that the Seventh Circuit also acknowledged, see Pet. App. 20a. First, respondent contends that "most of the district court decisions finding preclusion predate this Court's decision in *Fitzgerald*," Br. in Opp. 23, but as shown above, this is both misleading and irrelevant. Second, respondent contends that "some" of the district court decisions cited in the petition "failed to allege Constitutional Equal Protection claims, and instead are § 1983 actions seeking to enforce statutory provisions of the ADEA." Br. in Opp. 23-24. But respondent does not identify a single example of such a decision from the petition. Nor can he, for while some of the many district court decisions cited in the petition described the plaintiff's § 1983 claim in general terms—without distinguishing between an underlying ADEA or constitutional

claim—none purported to limit its analysis to non-constitutional claims, and many relied on one or more of the federal appellate decisions holding that the ADEA displaces constitutional causes of action.* Finally, respondent criticizes an unspecified "number of district court cases" for purported errors in their analysis, Br. in Opp. 24, but, again, this goes to the merits of this case, not to the existence or extent of the deepening division among lower courts.

In short, respondent cannot deny the existence of a split among the federal courts, and he fails in his effort to downplay this growing divide.

II. This Case Presents An Ideal Vehicle For Resolving The Split In Authority.

1. Respondent suggests that this case is a poor vehicle for certiorari review because petitioners appeal

---

* See *Ray v. City of Opa-Locka*, No. 12-CV-21769, 2012 WL 4896162, at *3 (S.D. Fla. Oct. 15, 2012); *Adair v. eStem Pub. Charter Schs.*, No. 4:11-cv-541-DPM, 2012 WL 474019, at *2 (E.D. Ark. Feb. 14, 2012); *Kelley v. White*, No. 5:10CV00288 JMM, 2011 WL 4344180, at *3 (E.D. Ark. Sept. 15, 2011); *Hamilton v. City of Springdale*, Civil No. 10-5061, 2011 WL 2560258, at *13 (W.D. Ark. June 29, 2011); *Dudley v. Lake Ozark Fire Prot. Dist.*, No. 09-4086-cv-c-NKL, 2010 WL 1992188, at *8 (W.D. Mo. May 17, 2010); *Gregor v. Derwinski*, 911 F. Supp. 643, 651 (W.D.N.Y. 1996); *Tranello v. Frey*, 758 F. Supp. 841, 850-851 n.3 (W.D.N.Y. 1991), aff'd on other grounds, 962 F.2d 244 (2d Cir. 1992).

from an interlocutory decision denying qualified immunity. See Br. in Opp. 7. But "qualified immunity * * * is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Thus, provided that a district court's order denying qualified immunity "'turns on an issue of law'" (as the decision here does), that order is appealable notwithstanding "'the absence of a final judgment.'" *Ibid.* (quoting *Mitchell*, 472 U.S. at 530). For the same reason, the interlocutory status of an appellate court's decision denying qualified immunity does not affect its suitability for certiorari review, as this Court's many decisions granting certiorari from a denial of qualified immunity confirm. See, *e.g.*, *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (reversing appellate court's denial of qualified immunity); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1241, 1250-1251 (2012) (same); *Pearson v. Callahan*, 555 U.S. 223, 227, 243-245 (2009) (same); see also Eugene Gressman *et al.*, SUPREME COURT PRACTICE 281 n.65 (9th ed. 2007) (distinguishing between "interlocutory" decisions, which are less appealing candidates for certiorari review, and "final" decisions, which include appeals from the denial of qualified immunity).

That petitioners appealed the district court's decision denying qualified immunity on respondent's age discrimination claim but not his sex discrimination claim does not change this result, contrary to respondent's suggestion. See Br. in Opp. 7. Resolution of his sex discrimination claim will require respondent

to present—and petitioners to rebut—different evidence than his age discrimination claim. Qualified immunity entitles petitioners to avoid the time, expense, and other burdens of litigating the latter claim, even while the former claim proceeds.

2. Respondent also suggests that petitioners do not seek review of an appealable issue. See Br. in Opp. 27. But, again, petitioners properly appealed from the denial of qualified immunity pursuant to the collateral order doctrine. See *Mitchell*, 472 U.S. at 526-527. A defendant is entitled to qualified immunity if the plaintiff fails to state a viable claim or fails to show that the rights allegedly violated were clearly established at the relevant time. *Reichle*, 132 S. Ct. at 2093. In this case, petitioners contend that respondent cannot state a viable § 1983 age discrimination claim because no such claim is cognizable. Thus, as the court below held, "the very existence of a freestanding damages remedy under § 1983 is directly implicated by a qualified immunity defense such that we have jurisdiction over this appeal." App. 7a-8a (citing *Wilkie v. Robbins*, 551 U.S. 537 (2007)).

III. Respondent's Merits Arguments Fall Short.

Respondent raises a number of arguments on the merits. We address these claims briefly in turn.

1. Respondent contends that rights may be enforceable pursuant to § 1983 even when they overlap with other remedies, but this does nothing to advance his argument. See Br. in Opp. 8 (citing *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 672 (1963), and *Monroe v. Pape*, 365 U.S. 167, 172-174

(1961), overruled on other grounds, *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978)). After *McNeese* and *Monroe* were decided, this Court made clear that § 1983's reach may be limited by a comprehensive remedial scheme in another federal statute. See *Sea Clammers*, 453 U.S. at 19-21; *Smith*, 468 U.S. at 1008-1013; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-125 (2005). The very point of the many decisions that have rejected the Seventh Circuit's rule, and of petitioners' position in this case, is that the ADEA displaces § 1983 equal protection claims under the *Sea Clammers* line of authority. In any event, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court distinguished *Monroe* and *McNeese* on the ground that there, unlike here, "no other, more specific federal statute was involved that might have reflected" a congressional intent to displace the § 1983 remedy. *Id.* at 492 n.10.

2. And while respondent attempts to distinguish *Preiser* on the ground that the habeas corpus statute at issue there was specifically designed to address constitutional claims, see Br. in Opp. 12, that distinction falls flat. In holding that the habeas statute displaced the § 1983 remedy, *Preiser* relied on the comprehensive remedial scheme requiring state court exhaustion as a precondition to suit: "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the habeas statute's exhaustion] requirement by the simple expedient of putting a different label on their pleadings." 411 U.S. at 489-490. The Court's focus was on the remedial

scheme, not the fact that there was an express design to address constitutional claims.

3. Nor does respondent succeed in distinguishing *Smith*. There, the Court held that the Education of the Handicapped Act displaced equal protection claims under § 1983, and that statute did include language making reference to constitutional claims. See 468 U.S. at 1010. As the petition explained, however, such references are not surprising in a law that, unlike the ADEA, regulates solely government actors subject to constitutional requirements. See Pet. 19. Moreover, the Court in *Smith* stressed the "comprehensive nature of the procedures and guarantees" in the Act and held, as the Seventh Circuit should have concluded here, that "[a]llowing a plaintiff to circumvent the [statute's] administrative remedies would be inconsistent with Congress' carefully tailored scheme." 468 U.S. at 1011, 1012.

4. Finally, cases holding that Title VII does not preclude § 1983 claims by state and municipal employees do not counsel against preclusion, as respondent contends. See Br. in Opp. 20, 22, 25, 26. Indeed, even the Seventh Circuit recognized that Title VII "does not add much to [the] analysis" here because that statute departs in "significant ways" from the ADEA. Pet. App. 31a-32a n.5.

Most importantly, "the remedial provisions of the ADEA," which are the "focus" of any preclusion analysis, "differ from those of Title VII." Pet. App. 31a-32a n.5. This Court emphasized this distinction in *Lorillard v. Pons*, 434 U.S. 575 (1978), which recognized

that § 626(b), one of the ADEA's remedial provisions, incorporates elements of the Fair Labor Standards Act by reference, demonstrating Congress' intent that "the ADEA be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA," not Title VII. 434 U.S. at 580 (quoting 29 U.S.C. § 626(b)) (emphasis omitted); see also Pet. 14. Accordingly, while the Court acknowledged the "important similarities" between the ADEA and Title VII, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions," the Court stressed the "significant differences" between the two in terms of their "remedial and procedural provisions." *Lorillard*, 434 U.S. at 584; see also *id.* at 584-585 (listing many differences between two laws' remedial schemes).

In addition, Title VII's legislative history—unlike the ADEA's—includes specific statements making clear that Congress intended to preserve state and municipal employees' right to advance constitutional claims for race and gender discrimination in the workplace. It is precisely this language, appearing in a 1972 House Report accompanying the bill that extended Title VII to state employees, on which circuit courts have relied to preserve § 1983 remedies for those workers. See, *e.g.*, *Trigg v. Fort Wayne Cmty. Schs.*, 766 F.2d 299, 300-301 & n.3 (7th Cir. 1985) (quoting H.R. Rep. 92-238, at 17 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154, for its statement that "'[i]n establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to * * * 1981 and 1983, is in no way affected'").

There is "no comparable evidence of congressional intent to support § 1983 equal protection challenges in the area of age discrimination concurrent with the comprehensive remedial framework of the ADEA." *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1371 n.5 (4th Cir. 1989); see also *Ring v. Crisp Cnty. Hosp.*, 652 F. Supp. 477, 480, 482 (M.D. Ga. 1987). The Seventh Circuit thus rightly rejected respondent's analogy to Title VII on this ground as well. See Pet. App. 31a-32a n.5 ("Title VII's legislative history also speaks explicitly to the issue of § 1983 preclusion, while there is no similar history for the ADEA."). Here, too, therefore, respondent's arguments on the merits fall short.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

FEBRUARY 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, ET AL.,

Petitioners,

v.

HARVEY N. LEVIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CHARLES W. THOMPSON, JR.
Executive Director,
General Counsel
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
7910 Woodmont Ave.,
Suite 1440
Bethesda, MD 20814

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker
Chicago, Illinois 60601
bjmurray@jonesday.com
(312) 782-3939

THOMAS J. DAVIS
JENNIFER B. LICHTER
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. BY ALLOWING § 1983 AGE DISCRIMINATION CLAIMS AND ADEA CLAIMS TO CO-EXIST, THE SEVENTH CIRCUIT GIVES PLAINTIFFS AN ALTERNATIVE MEANS FOR BRINGING ADEA-TYPE CLAIMS WITHOUT ADEA PROCEDURES 4

A. The ADEA Vindicates the Equal Protection Clause's Guarantee Against "Arbitrary" Age Discrimination, and Thus Should Provide the Procedures for Addressing Such Claims. 6

B. Without Preemption, § 1983 Suits Will Become a Substitute Method of Bringing ADEA-Type Claims, Contrary to the Intent of Congress. 8

II. The Seventh Circuit's Decision Will Increase Litigation and Litigation Costs, at the Expense of the Courts, Governments, and the Public 12

TABLE OF CONTENTS
(continued)

Page

A. Allowing § 1983 Age-Discrimination Claims Will Prevent Administrative Review and Conciliation of Age Claims, Leading to a Greater Quantity and Lower Quality of Federal-Court Suits. 13

B. With Respect to State Employers, *Levin* Renders *Kimel v. Board of Regents* a Dead Letter By Allowing Damages For What are Effectively ADEA Claims. 17

C. When State and Municipal Governments Face Increased Litigation Costs and Exposure to Damages Awards, the Funds Available for Public Services are Directly Reduced. 18

TABLE OF AUTHORITIES

Page(s)

CASES

Abel v. Auglaize County Highway Dept.,
276 F. Supp. 2d 724 (N.D. Ohio 2003) 11

Alden v. Maine,
527 U.S. 706 (1999) 10

Ahlmeyer v. Nev. Sys. Of Higher Educ.,
555 F.3d 1051 (9th Cir. 2009) 7, 18

Bankers Life and Cas. Co. v. Crenshaw,
486 U.S. 71 (1988) 6, 9, 10

Board of Education v. Rowley,
458 U.S. 176 (1982)..... 7

Board of Trustees. V. Garrett,
531 U.S. 356 (2001) 10

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 15

Burkhardt v. Lindsay,
811 F. Supp. 2d 632 (E.D.N.Y. 2011) 11

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 7, 10

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

City of Ranchos Palos Verdes v. Abrams,
544 U.S. 113 (2005) 8

Engquist v. Oregon Dept. of Agriculture,
553 U.S. 591 (2008) 10

Federal Express Corp. v. Holowecki,
552 U.S. 389 (2008) 13

Gregory v. Ashcroft,
501 U.S. 452 (1991) 9

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 12

Intel Corp. v. Advanced Micro Devices, Inc.,
542 U.S. 241 (2004) 15

Kentucky v. Graham,
473 U.S. 159 (1985) 17

Kimel v. Board of Education,
528 U.S. 62 (2000) 4, 6, 7, 9, 17

Kralman v. Illinois Dep't of Veterans' Affairs,
23 F.3d 150 (7th Cir. 1994) 13

Levin v. Madigan,
692 F.3d 607 (7th Cir. 2012)..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Levin v. Madigan, No. 07-C-4765, 2011 WL 2708341 (N.D. Ill. 2011) 11

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 6

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 8-9

Mummelthie v. City of Mason City, 873 F. Supp. 1293 (N.D. Iowa 1995) 11-12

Mustafa v. Neb. Dep't of Corr. Servs., 196 F. Supp. 2d 945 (D. Neb. 2002) 5

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 13

Preiser v. Rodriguez, 411 U.S. 475 (1973)..... 3, 6, 9, 12

Shapiro v. New York City Dept. of Educ., 561 F. Supp. 2d 413 (S.D.N.Y. 2008) 11

Siler v. Hancock County Bd. of Educ., 510 F. Supp. 2d 1362 (M.D. Ga. 2007) 11

Smith v. Robinson, 468 U.S. 992 (1984)..... 2, 6, 7, 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Stalhut v. City of Lincoln,
145 F. Supp. 2d 1115 (D. Neb. 2001) 11

Smith v. Wade,
461 U.S. 30, 35 (1983) 18

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 14-15

Vance v. Bradley,
440 U.S. 93 (1979) 9

Village of Willowbrook v. Olech,
528 U.S. 562 (2000) (per curiam) 7

Western Air Lines, Inc. v. Criswell,
472 U.S. 400 (1985) 9

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, amendment XIV ..... *passim*

29 U.S.C. § 621 6

29 U.S.C. § 623 9

29 U.S.C. § 626 ..... 8, 13

42 U.S.C. § 1983 ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 Alb. L. Rev. 143 (2006) 16

Kevin Corcoran, *Hoosiers Get Stuck With State's Legal Bills*, Indianapolis Star (Sept. 19, 2002), at A1 19

Jury Verdict Research, Employment Practice Liability: Jury Award Trends and Statistics (2006) 16

Bethany Krajelis, *Group Reports On City Litigation Costs, Urges Constraint*, Chicago Daily Law Bulletin (Jul. 28, 2011), *at* http://www.chicagolawbulletin.com News-Extra/study1-7282011bk.aspx 19

Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 Hofstra Lab. & Emp. L.J. 671 (2005) 14

Phil Oliff, *et al.*, Center on Budget and Policy Priorities, *States Continue To Feel Recession's Impact* 2 (Jun. 27, 2012), *available at* http://www.cbpp.org/files/2-8-08sfp.pdf 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Michael A. Pagano, et al., National League of Cities, *Research Brief on America's Cities* 7 (Sept. 2012) *available at* http://www.nlc.org/find-city-solutions/center-for-research-and-innovation/finance/city-fiscal-conditions-in-2012 19

Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost Of Electronic Discovery In Employment Litigation,* 14 Rich. J.L. & Tech. 9 (2008) 15

Steve Schultze, *Abele Budget Still Leaves $92 Million Shortfall In 4 Years, Study Says, Milwaukee Journal Sentinel* (Oct. 10, 2012), *at* 2012 WLNR 21562338 18-19

Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability For Constitutional Wrongdoing?,* 86 Iowa L. Rev. 1209 (2001) 17-18

Michelle Singletary, *Shock Therapy To Avoid Scams,* Washington Post (July 31, 2012), *available at* 2012 WLNR 20309401 20

Bill Swinford, *Business Leaders: Too Many Frivolous Lawsuits Cost Jobs,* Marion Daily Republican (May 1, 2012), at 5A, *available at* 2012 WLNR 9229778 19

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Equal Employment Opportunity Commission, Age Discrimination in Employment Act FY 1997 FY 2012, *at* http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm 14

INTEREST OF AMICUS CURIAE[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3500 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its founding, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA respectfully submits this brief to highlight the danger of the Seventh Circuit's ruling in *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012) to state and

[1]Pursuant to Rule 37.6, *amicus curiae* and their counsel hereby represent that none of the parties to this case nor their counsel authored this brief in whole or part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of IMLA's intention to file this brief.

municipal governments, as the practical effect of the ruling will erroneously subject state and municipal employers to increased litigation costs and damages awards that they cannot afford. Accordingly, IMLA writes to urge this Court to grant certiorari.

SUMMARY OF ARGUMENT

The petition for certiorari explains why, as a matter of law, the ADEA should be held to preempt § 1983 age discrimination cases against state and municipal employees. *Amicus* calls attention to two erroneous premises regarding the ADEA and § 1983 claims on which *Levin* rests, which if properly understood, further demonstrate the need for preemption. Amicus also discusses the consequences of allowing both ADEA and § 1983 age discrimination claims, including significantly higher litigation costs and damages exposure for governmental employers.

First, while the ADEA provides plaintiffs with greater statutory protection against age discrimination than does the constitution, the ADEA does vindicate both statutory *and* constitutional rights, contrary to the Seventh Circuit's apparent understanding. The constitution protects against arbitrary age discrimination; so does the ADEA. And because constitutional age-discrimination claims are reviewed only for rational basis, any act that violates the constitution would also violate the ADEA. In *Smith v. Robinson*, 468 U.S. 992 (1984)—another case involving a statute which subsumed a rational-basis equal-protection right within its substantive statutory requirements—this Court held that § 1983 equal protection claims were preempted and that plaintiffs had to follow the statute's more specific

procedures for vindicating their constitutional claims. The same rationale for preemption applies here.

Second, if § 1983 claims are not preempted, they will become a substitute method for bringing ADEA-style claims—one which lets plaintiffs avoid the ADEA's mandatory administrative processes favoring voluntary conciliation of claims. This is so for two reasons: (1) the ADEA prevents employers from relying on plausible, constitutional age-based rationales for employment actions, because to do so would be an admission of statutory liability; and (2) by effectively requiring employers to adopt age-neutral criteria for employment decisions, age-based discrimination will arguably be arbitrary and irrational, and thus lacking a "rational basis" under the constitution. In actual practice, those district courts which have allowed § 1983 age-discrimination claims—including the district court here—appear to presume the irrationality of age discrimination, and simply review constitutional age claims under the same framework used for assessing ADEA claims. This Court has found preemption in other cases where otherwise, plaintiffs could "wholly frustrate explicit congressional intent" and avoid statutory "requirement[s] by the simple expedient of putting a different label on their pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973).

The consequences of allowing plaintiffs to simply bring ADEA-style claims under § 1983, and under the same standards of review, would be disastrous for state and municipal governments. The ADEA's mandate that the EEOC attempt to conciliate age-discrimination claims is a very effective method of resolving such cases without resorting to federal

court. Under § 1983, there is no such requirement, and so the federal courts will be flooded with a greater amount of low-quality cases.

Further, because well-pled age discrimination claims are likely to survive motions to dismiss regardless of factual merit, these cases will advance to the discovery stage at a minimum—which is by far the most costly aspect of civil litigation. Discovery costs in employment discrimination are one-sided, falling almost entirely on the government and creating perverse incentives to settle unmeritorious cases. Statistically, government employers also fare relatively poorly in those discrimination suits that do go to trial. Further, allowing § 1983 claims also permits plaintiffs to avoid this Court's ruling in *Kimel v. Board of Education*, 528 U.S. 62 (2000) and recover damages (indirectly) from state governments, creating a new source of damages that would otherwise not be present under the ADEA.

These increased costs and damages will directly impact state and local governments' ability to serve the public. The costs of litigation directly impact budgets which have already been cut or otherwise strained over the last few years. Certiorari should be granted and the Seventh Circuit's decision reversed.

ARGUMENT

I. BY ALLOWING § 1983 AGE DISCRIMINATION CLAIMS AND ADEA CLAIMS TO CO-EXIST, THE SEVENTH CIRCUIT GIVES PLAINTIFFS AN ALTERNATIVE MEANS FOR BRINGING ADEA-TYPE CLAIMS WITHOUT ADEA PROCEDURES.

As discussed at length in the certiorari petition, every appellate court other than the Seventh Circuit

to address the issue has held that the ADEA preempts equal-protection age-discrimination claims by state and municipal employees, as the ADEA's comprehensive remedial regime shows that Congress intended to foreclose resort to any other statute for the enforcement of its substantive provisions. Pet. 12-22. The certiorari petition persuasively explains why this is so as a matter of precedent.

Amicus wishes to additionally bring to the Court's attention two fundamentally erroneous premises on which the Seventh Circuit's decision appears to rest: that the ADEA does not "address constitutional issues," 692 F.3d at 618, and that "Section 1983 cannot be used as an alternative mechanism to assert violation of the ADEA's provisions against the states," *id.* at 619-20 (quoting *Mustafa v. Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 956 n.13 (D. Neb. 2002)). In fact, the ADEA does provide a remedy for constitutional violations, and as a practical matter, the ADEA's provisions ensure that constitutional age discrimination claims will become an "alternative mechanism" for bringing ADEA-type claims against state and municipal governments.

By misapprehending the scope of the ADEA and its interplay with the corresponding constitutional right against age-discrimination, the Seventh Circuit's ruling enables government employees to bring the *same claim* he or she might have under the ADEA, but with additional benefits (such as damages from state officials) while at the same time depriving state and municipal employers (and only those employers) of the ADEA's statutory protections. Not only is this result unjust and dangerous to state and municipal governments, it is itself further proof that the ADEA

and § 1983 age claims are simply incompatible, and that the former must implicitly preempt the latter.

A. The ADEA Vindicates the Equal Protection Clause's Guarantee Against "Arbitrary" Age Discrimination, and Thus Should Provide the Procedures for Addressing Such Claims.

As the Seventh Circuit recognized, comprehensive statutory remedial schemes may preempt constitutional claims brought under § 1983 to vindicate the same right. *Levin*, 692 F.3d at 618 (citing *Smith v. Robinson*, 468 U.S. 992 (1984) and *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). It held, however, that the ADEA's provisions provided a "mechanism to enforce *only* the substantive rights created by the ADEA itself." *Id.* at 619. (internal quotation marks and citation omitted). This is simply incorrect; the ADEA protects the *same* right as the equal protection clause, and at a higher level of scrutiny than the constitution does alone.

The statutory purpose of the ADEA is "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b) (emphasis added). That is the same guarantee provided by the equal protection clause. This Court has clearly established that "age discrimination in employment violates the Equal Protection Clause." *Levin*, 692 F.3d at 622 (citing *Kimel v. Board of Regents*, 528 U.S. 62, 83 (2000)). And while age discrimination claims are only subject to rational basis review, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), "arbitrary and irrational discrimination violates the Equal Protection Clause under even [this Court's] most deferential standard of review," *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). This is so

whether "intentional and arbitrary discrimination" is "occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (internal quotation marks and citations omitted).

To be sure, this Court has held that the ADEA's prohibitions are broader than that of the constitution, "effectively elevat[ing] the standard for analyzing age discrimination to heightened scrutiny." *Kimel*, 528 U.S. at 88. As such, age-discrimination claims that would fail rational-basis review are subsumed within, and remedied by, the ADEA itself. *See Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1058 (9th Cir. 2009) ("We are unable to perceive . . . a constitutional claim for age discrimination that is not vindicated fully by the ADEA.").

Indeed, in this sense, the ADEA is similar to the Education of the Handicapped Act (EHA), which the Seventh Circuit addressed but held distinguishable. *Levin*, 692 F.3d at 618-19. While discrimination against the disabled is subject only to rational basis review, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), the EHA protects disabled children's equal-protection right to equal educational access while *also* providing broader, more comprehensive remedies above that constitutional floor, *Bd. of Education v. Rowley*, 458 U.S. 176, 198-204 (1982). In *Smith v. Robinson*, this Court held that the EHA's statutory remedies preempted § 1983 claims, as allowing § 1983 claims would "render superfluous most of the detailed procedural protections outlined in the statute" and "run counter to Congress' view that" the underlying right to be

vindicated was best served through the administrative procedures set forth in the EHA, noting that "[n]o federal district court presented with a constitutional claim to a public education can duplicate that process." 423 U.S. at 1011-12.

Here, as in *Smith*, the equal protection right to be free of arbitrary age discrimination is addressed by, and vindicated by, the broader substantive protections of the ADEA. And, like in *Smith*, allowing a plaintiff to resort to § 1983 would run counter to Congress's view that age discrimination should be resolved through an administrative process calling for "informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b); *see also infra* Part II.A. As in *Smith*, the specific statutory means of vindicating age discrimination should proceed through the ADEA and not § 1983.

B. Without Preemption, § 1983 Suits Will Become a Substitute Method of Bringing ADEA-Type Claims, Contrary to The Intent of Congress.

Another fundamental error in the Seventh Circuit's reasoning is that, if ADEA and § 1983 age-discrimination claims are both viable, then § 1983 *does* become an effective alternative to vindicate ADEA rights without any of the corresponding ADEA responsibilities. *See Levin*, 692 F.3d at 619-20. This also supports preemption; Congress cannot plausibly have intended to both *create* new substantive rights and then have them vindicated through a generic statute that lacks all of the protections intended to accompany those rights. *See City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea*

Clammers Ass'n, 453 U.S. 1, 20 (1981); *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973).

To illustrate how this is so, recall that the constitution allows age-based classifications so long as they have rational bases. A government employer could rely on such general classifications so long as it set forth a plausible age-related reason for doing so, even if "imperfect" or "not true . . . in the majority of cases." *Kimel*, 528 U.S. at 85-86. Thus, older employees could be terminated at a certain age in order to avoid "tedious and often perplexing decisions" about whether they were still physically or mentally fit for a job, *Gregory v. Ashcroft*, 501 U.S. 452, 471-72 (1991), or as a part of "personnel policies . . . designed to create predictable promotion opportunities and thus spur morale" among younger workers, *Vance v. Bradley*, 440 U.S. 93, 98-101 (1979). Only "arbitrary" and "irrational" age-based classifications would be unconstitutional, *see Bankers Life*, 486 U.S. at 83, and decisions based on plausible age-based generalities are neither.

By contrast, the ADEA makes it flatly "unlawful" to "discriminate against any individual because of such individual's age," with limited exceptions. *See, e.g.*, 29 U.S.C. § 623(a), (b), (j). The sort of plausible, if imperfectly-fitting, rationales for favoring younger employees over older, while sufficient to protect against constitutional equal-protection claims, will subject an employer to statutory liability. *See, e.g., Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408, 423 (1985) (affirming ruling that requiring flight engineers to retire at 60, where employer's justification was age-based physical decline and greater health issues, violated the ADEA).

As a practical matter, then, the statutory provisions of the ADEA require state and municipal employers to officially adopt non-discriminatory policies with respect to age.[2] But ironically, by doing so, the ADEA enables plaintiffs to allege valid § 1983 age-discrimination claims. The rational basis test is not satisfied if the Government's means are not "rationally related" to a "legitimate" end, *Cleburne*, 473 U.S. at 440; that is, if an action is arbitrary and irrational. *Bankers Life*, 486 U.S. at 83. When, as is the case for virtually all state and municipal jobs, official policy is *not* to discriminate through age-based generalities, plaintiffs will undoubtedly argue that employment actions intended to harm someone because of their age are not "legitimate," and would in fact be "arbitrary" and "irrational" deviations from stated policy. If so, such claims would likely clear the hurdle of rational-basis review.[3]

---

[2] While state employers have sovereign immunity from suits by individuals, *see infra* Part II.B, states remain subject to the ADEA, can be sued by the federal government (via the EEOC), and thus cannot simply ignore the ADEA's precepts. *See Alden v. Maine*, 527 U.S. 706, 755 (1999) ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government"); *cf. Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (allowing EEOC suits against states for violations of the Americans With Disabilities Act, despite the states' sovereign immunity).

[3] In *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 605-09 (2008), this Court limited the availability of equal protection claims in the public employment setting; however, that ruling was expressly limited to "class of one" claims—*i.e.*, where someone is "fired not because she was a member of an identified class . . but simply for 'arbitrary, vindictive, and malicious reasons.'" *Id.* at 595, 607. Without clarification by this court, a government employee's age-based discrimination claim would not fall under *Engquist*'s core holding.

Indeed, in the district court decision in this very case, and in other cases rejecting ADEA preemption, the irrationality of the alleged age discrimination appears to be presumed when (as it must to avoid statutory ADEA liability) the employer asserts non-age-based reasons for the termination. These courts simply ask whether the asserted reasons are false pretexts for age discrimination, using the familiar *McDonnell Douglas* test used for ADEA claims. *See Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341, at *12-20 & n.16 (N.D. Ill. July 12, 2011); *Burkhardt v. Lindsay*, 811 F. Supp. 2d 632, 651 (E.D.N.Y. 2011) (citing authority for proposition that "[a]ge-based employment discrimination claims brought pursuant to § 1983 are analyzed under the three-step, burden-shifting framework" of *McDonnell Douglas*); *Shapiro v. New York City Dep't of Educ.*, 561 F. Supp. 2d 413, 422 n.2 (S.D.N.Y. 2008) ("An equal protection claim for age discrimination pursuant to § 1983 is analyzed under the same standards as a claim made pursuant to the ADEA."); *Siler v. Hancock Cnty. Bd. of Educ.*, 510 F. Supp. 2d 1362, 1381-82 (M.D. Ga. 2007) ("when a plaintiff asserts a §1983 claim based on age discrimination, courts apply the same analysis to such a claim as they would an ADEA claim."); *Abel v. Auglaize County Highway Dept.*, 276 F. Supp. 2d 724, 733 (N.D. Ohio 2003) ("Since Plaintiff claims age discrimination in violation of 42 U.S. § 1983, he can make the required showing of discriminatory intent and purpose by following the methods of proof in Age Discrimination in Employment Act cases."); *Stalhut v. City of Lincoln*, 145 F. Supp. 2d 1115, 1121-22 (D. Neb. 2001) (applying *McDonnell Douglas* to both ADEA and § 1983 age claim); *Mummelthie v. City of Mason City*, 873 F. Supp. 1293, 1332-36 (N.D. Iowa

1995) ("a § 1983 claim based on alleged violation of equal protection in the employment context is analyzed in the same way as . . . an ADEA claim of age discrimination").

Allowing concurrent lawsuits under the ADEA and § 1983 thus places state and municipal employers in an impossible position. Because of the requirements of the ADEA itself, plaintiffs can choose to file a constitutional age-discrimination suit, have the claim treated *exactly* like an ADEA disparate-treatment claim, while entirely avoiding the ADEA's comprehensive procedural framework. This Court has made clear that § 1983 claims are preempted if otherwise, plaintiffs could "wholly frustrate explicit congressional intent" and avoid statutory "requirement[s] by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-490; *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106–07 (1989) (finding preemption if "allowing a plaintiff to bring a § 1983 action would be inconsistent with Congress's carefully tailored scheme."). The *Levin* decision allows precisely this, and for that reason this Court should grant certiorari and reverse.

II. THE SEVENTH CIRCUIT'S DECISION WILL INCREASE LITIGATION AND LITIGATION COSTS, AT THE EXPENSE OF THE COURTS, GOVERNMENTS, AND THE PUBLIC.

The consequences of allowing plaintiffs to bring ADEA-style claims under § 1983 while avoiding the ADEA's procedures will be severe. *Levin* will lead to an explosion of litigation costs and damages awards that state and municipalities are ill-equipped to afford.

A. Allowing § 1983 Age-Discrimination Claims Will Prevent Administrative Review and Conciliation of Age Claims, Leading to a Greater Quantity and Lower Quality of Federal-Court Suits.

When Congress drafted the ADEA, it placed the primary responsibility for enforcement with the Equal Employment Opportunity Commission. *See, e.g., Kralman v. Ill. Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994). An aggrieved employee cannot simply rush into court; rather, he or she must first file a charge with the EEOC, who will then notify the employer about the alleged age discrimination and then attempt "to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d); *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) ("The agency's duty to initiate informal dispute resolution processes upon receipt of a charge is mandatory in the ADEA context."). Such informal administrative mediation and conciliation is particularly necessary in the ADEA context, where the length of formal litigation "is particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 757 (1979) (internal quotation omitted).

Moreover, EEOC conciliation is a highly useful and effective means of resolving age-discrimination claims without resort to federal litigation. For instance, in FY 2012, the EEOC resolved 27,335 ADEA charges (more than the 22,857 new ADEA

charges filed that year).[4] A full 23,284 those claims – or 85.2% – were found to lack reasonable cause to believe that discrimination occurred, or were closed for administrative reasons. Of the 4,051 remaining merits resolutions, however, 3,624 were either settled, voluntarily withdrawn after the employer granted the employee a benefit, or successfully conciliated by the EEOC. Only 427 meritorious claims could not be conciliated. There can be little doubt that this administrative process "at once enables aggrieved individuals to seek redress for harms suffered, allows employers to resolve workplace disputes earlier and through more informal means, and helps to reduce the federal court dockets." Anne Noel Occhialino & Daniel Vail, *Why The EEOC (Still) Matters*, 22 Hofstra Lab. & Emp. L.J. 671, 692 (2005).

If, however, as *Levin* presages, ADEA claims can simply be recast as § 1983 age-discrimination claims, this critical conciliation mechanism will be bypassed altogether, to the detriment of state and municipal employers (and only those employers). This, in turn, will increase the quantity and decrease the quality of age-discrimination claims in federal courts. Not only will these additional suits be costly in terms of already-scarce judicial resources, they will also lead to skyrocketing state and municipal litigation costs.

This is so because, regardless of factual merit, well-pled claims of disparate treatment will largely survive motions to dismiss, *see, e.g., Swierkiewicz v.*

---

[4] This statistical data is taken from the EEOC's website at http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

Sorema N.A., 534 U.S. 506 (2002),[5] and therefore such claims—including claims that otherwise might have been resolved by the EEOC—will proceed to civil discovery prior to summary judgment. As this Court has recognized, discovery is by far the most costly aspect of modern civil litigation, amounting to between 60 and 90 percent of all litigation costs. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting). And in the employment-discrimination context, these costs are decidedly one-sided against government employers, who will have far more electronically-stored information of potential relevance than will a single plaintiff. *See* Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost Of Electronic Discovery In Employment Litigation*, 14 Rich. J.L. & Tech. 9, ¶¶ 6-7 (2008). Because such discovery costs can approach or exceed the potential damages available to a plaintiff, even a party with a weak claim (one which might not have survived EEOC mediation) can leverage the specter of discovery costs to "systemically force [a state or municipal defendant] to either resolve cases that would otherwise be decided on the merits, or resolve them at a higher price because electronic discovery is inevitable." *See id.* ¶ 8.

---

[5] In *Swierkiewicz*, this Court unanimously held that age-discrimination claims were sufficiently pled by asserting that a termination was due to age, and giving "the events leading to [the] termination, provid[ing] relevant dates, and includ[ing] the ages . . . of at least some of the relevant persons involved with [the] termination." 534 U.S. at 514. Later, in *Bell Atlantic Corp. v. Twombly*, this Court found that *Swierkiewicz* was consistent with the new Rule 12(b)(6) pleading standard that it was announcing. 550 U.S. 544, 569-70 (2007).

Finally, if these claims do manage to proceed to trial, successful age-discrimination plaintiffs will be "awarded larger compensatory damages than victorious plaintiffs alleging other forms of discrimination." Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 Alb. L. Rev. 143, 175 (2006). Government defendants have also faired particularly poorly in employment discrimination suits. *See* Jury Verdict Research, *Employment Practice Liability: Jury Award Trends and Statistics* 27 (2006) (showing that plaintiffs obtained a median award of $212,544 in federal employment-discrimination suits against government entities—20% higher than all defendants overall, and highest of the defendant types listed).

There should be no mistake that state and local governments, large and small, will face burdensome litigation under *Levin*. Government officials make millions of employment decisions each year, and the potential number of newly-permitted § 1983 age-discrimination claims that they could face is substantial to say the least. By allowing plaintiffs to avoid Congress's preference for mediation of age-discrimination claims, the courts will be clogged with weak and frivolous suits, which will impose huge discovery costs on state and municipal governments, and potentially lead to more settlements of unmeritorious claims, and the payment of more and larger damages awards.

B. With Respect to State Employers, *Levin* Renders *Kimel v. Board of Regents* a Dead Letter By Allowing Damages For What are Effectively ADEA Claims.

In *Kimel v. Board of Regents*, this Court held that Congress, through the enactment of the ADEA, did not validly abrogate the states' sovereign immunity so as to allow damages claims against the states without their consent. 528 U.S. at 66-67. The *Levin* decision effectively nullifies *Kimel* by forcing states to pay damages claims through mere artful pleading.

The ADEA seeks to vindicate an employee's right to be free from arbitrary age discrimination by allowing suit against the employer tolerating the discrimination, but not against individual employees personally. *See Levin*, 692 F.3d at 621. By contrast, § 1983 permits suit against *individuals* who allegedly violate constitutional rights under color of state law. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, using this case as an example, by naming the Attorney General personally as having violated the Equal Protection Clause and not the Attorney General's office, a plaintiff can make the same assertion of wrongdoing (since, after all, an agency can only act through its officials), yet recover damages. *See id.* at 166-67 (defendants in personal-capacity suits unable to claim sovereign immunity).

While the individual defendant would technically be personally liable for any such damages, states "frequently indemnify their employees to protect them from liability for unlawful conduct within the scope of their employment . . . that is subject to § 1983 liability," Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's*

§ 1983 Liability For Constitutional Wrongdoing?, 86 Iowa L. Rev. 1209, 1211 (2001), and so ultimately the states will bear the cost of any such § 1983 age-discrimination awards.

In other words, the practical effect of *Levin* is that it allows plaintiffs to (1) re-label their ADEA claims as equal-protection violations, while advancing the same claimed injury; (2) re-label the defendant as the supervisor instead of the employing agency while alleging the same wrongdoing; and (3) indirectly collect otherwise forbidden money damages from the state.[6] This creates an entire category of damages exposure that states heretofore did not have to face, and which as described below, they cannot afford.

C. When State and Municipal Governments Face Increased Litigation Costs and Exposure to Damages Awards, The Funds Available for Public Services are Directly Reduced.

The increase in burdensome federal litigation and the availability of damages that will be wrought by *Levin* will come at the direct expense of the public whom state and municipal governments serve. New lawsuits and new liabilities will divert state and municipal funds that could otherwise be used to fund governmental services, or else will require the imposition of new taxes or the acquisition of even more debt. *See, e.g.*, Steve Schultze, *Abele Budget*

---

[6] Further, an individual-capacity § 1983 suit also allows for punitive damages, *Smith v. Wade*, 461 U.S. 30, 35 (1983), which are not allowed against municipalities, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263-64 (1981), or under the ADEA alone, *see Ahlmeyer*, 555 F.3d at 1059. *Levin* thus increases the damages exposure for state and municipal employers alike.

Still Leaves $92 Million Shortfall In 4 Years, Study Says, Milwaukee Journal Sentinel, Oct. 10, 2012 (potential liability from municipal employee lawsuits "could pose a severe threat to future budgets"); Bill Swinford, *Business Leaders: Too Many Frivolous Lawsuits Cost Jobs*, Marion Daily Republican, May 1, 2012 ("'The money cities spend fighting frivolous lawsuits is taxpayer money that's sucked out of our city budgets,' [Herrin, IL Mayor Vic] Ritter said. 'That means we have to cut jobs, reduce services or raise taxes.'"); Bethany Krajelis, *Group Reports On City Litigation Costs, Urges Constraint*, Chicago Daily Law Bulletin, July 28, 2011 ("if [Chicago] didn't spend so much fighting and settling lawsuits, it could save taxpayer dollars, help the city to close its budget deficit and avoid personnel cuts"); Kevin Corcoran, *Hoosiers Get Stuck With State's Legal Bills*, Indianapolis Star, Sept. 19, 2002, at A1 (noting legal expenses and damages awards "siphon[] millions annually from state coffers.")

State and municipal governments—and ultimately, the taxpayers—simply cannot afford these expanded costs and liabilities. Today, over half of the states have "projected (and in most cases now have closed) budget gaps totaling $55 billion for fiscal year 2013," which combined with reduced federal aid have "le[d] to some of the deepest cuts to state services since the start of the recession.'" Phil Oliff, *et al.*, Center on Budget and Policy Priorities, *States Continue To Feel Recession's Impact* 2 (June 27, 2012), *available at* http://www.cbpp.org/files/2-8-08sfp.pdf; Michael A. Pagano, *et al.*, National League of Cities, *Research Brief on America's Cities* 7 (Sept. 2012) ("as of August 2012 . . . total local government employment in the U.S. had decreased by approximately 650,000 jobs

from peak levels in 2008."), *available at* http://www.nlc.org/find-city-solutions/center-for-research-and-innovation/finance/city-fiscal-conditions-in-2012. Among the agencies most affected by these cuts are state consumer protection bureaus[7]—the very sort of agency for whom respondent Levin worked, and from whom he now seeks $1,000,000 or more in compensatory and punitive damages. Doc. 16 at 22-23. The Seventh Circuit's unnecessary and erroneous enabling of his suit, and others like it, only exacerbates the harm to state and municipal governments that budget woes have already brought.

* * *

For these reasons, the Petition for a Writ of Certiorari should be granted.

---

[7] *See* Michelle Singletary, *Shock Therapy To Avoid Scams*, Washington Post, July 31, 2012, *available at* 2012 WLNR 20309401 ("[Director of consumer protection at the Consumer Federation of America Susan] Grant said state budget cuts were most frequently cited as the biggest challenges that state and local consumer protection agencies faced last year" and that "[i]n a year of austerity, consumer-protection services are something viewed as nonessential.")

Respectfully submitted,

CHARLES W. THOMPSON, JR.
Executive Director,
General Counsel
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
7910 Woodmont Ave.,
Suite 1440
Bethesda, MD 20814

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker
Chicago, Illinois 60601
(312) 782-3939
bjmurray@jonesday.com

THOMAS J. DAVIS
JENNIFER B. LICHTER
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001

February 15, 2013

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-872

In the Supreme Court of the United States

LISA MADIGAN, ET AL., PETITIONERS

v.

HARVEY N. LEVIN

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND ELEVEN OTHER STATES IN SUPPORT OF PETITIONERS

Matthew T. Nelson
Nicole L. Mazzocco
Special Assistant
Attorneys General
Warner Norcross
& Judd LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, MI 48909
BurschJ@michigan.gov
(517) 373-1124

Attorneys for *Amicus Curiae* State of Michigan

Library of Congress
Law Library

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130

Dustin McDaniel
Attorney General
State of Arkansas
323 Center St.
Little Rock, AR 72211

John W. Suthers
Attorney General
State of Colorado
1525 Sherman St.
Denver, CO 80203

Samuel S. Olens
Attorney General
State of Georgia
40 Capitol Sq., S.W.
Atlanta, GA 30334

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave.
2nd Fl.
Topeka, KS 66612

Michael A. Delaney
Attorney General
State of New Hampshire
33 Capitol St.
Concord, NH 03301

Robert E. Cooper, Jr.
Attorney General
State of Tennessee
425 5th Ave. N.
Nashville, TN 37243

Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

John E. Swallow
Attorney General
State of Utah
P.O. Box 142320
Salt Lake City, UT
84114

J.B. Van Hollen
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707

Gregory A. Phillips
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act precludes state and local government employees from asserting an age-discrimination claim under 42 U.S.C. § 1983.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 3

I. The Court should grant the petition and resolve the split among the circuits regarding whether the ADEA precludes age-discrimination claims under § 1983. 3

II. The Seventh Circuit erred by distinguishing between constitutional and statutory claims. 5

III. State and local governments require uniform treatment in their important role as employers. 10

Conclusion 22

TABLE OF AUTHORITIES

Federal Cases

Adickes v. *S.H. Kress & Co.*,
398 U.S. 144 (1970) 8

Ahlmeyer v. *Nevada Systems of Higher Education*,
555 F.3d 1051 (9th Cir. 2009) 3

Baker v. *McCollan*,
443 U.S. 137 (1979) 5

Blessing v. *Freestone*,
520 U.S. 329 (1997) 5

Board of Regents of the University of New Mexico v. *Migneault*,
582 U.S. 1110 (2000) 3

Brown v. *General Services Administrator*,
425 U.S. 820 (1976) 6, 8, 9

Chennareddy v. *Bowsher*,
935 F.2d 315 (D.C. Cir. 1991) 4

City of Rancho Palos Verdes v. *Abrams*,
544 U.S. 113 (2005) 9

Engquist v. *Oregon Department of Agriculture*,
553 U.S. 591 (2008) 10

Fitzgerald v. *Barnstable School Committee*,
555 U.S. 246 (2009) 5, 6

Lafluer v. *Texas Department of Health*,
126 F.3d 758 (5th Cir. 1997) 3

Middlesex County Sewerage Authority v. *National Sea Clammers Association*,
453 U.S. 1 (1981) 7

Migneault v. *Peck*,
158 F.3d 1131 (10th Cir. 1998) 3

Preiser v. *Rodriguez*,
411 U.S. 475 (1973) 7, 8, 9

Rancho Palos Verdes v. *Abrams*,
544 U.S. 113 (2005) 5, 6, 9

Smith v. *Robinson*,
468 U.S. 992 (1984) 6, 7, 8, 9

Tapia-Tapia v. *Potter*,
322 F.3d 742 (1st Cir. 2003) 2, 4

Waters v. *Churchill*,
511 U.S. 661 (1994) 10

Zombro v. *Baltimore City Police Department*,
868 F.2d 1364 (4th Cir. 1989) 3, 4, 10

State Cases

Lyons v. *Lederle Laboratories*,
440 N.W.2d 769 (S.D. 1989) 11

Office of Lake County State's Attorney v. *Human Rights Commission*,
601 N.E.2d 1294 (Ill. App. Ct. 1992) 21

Federal Statutes

29 U.S.C. § 626 ..... 1, 10

29 U.S.C. § 633 10

42 U.S.C. § 1983 ..... i, 1, 5

State Statutes

43 Pennsylvania Constitutional Statutes §§ 954, 955 18

775 Illinois Compiled Statutes 5/1-103, 5/2-101 to 5/2-102 ..... 13, 20

Alaska Statutes (LexisNexis) §§ 18.80.220, 18.80.300 11

Arizona Revised Statutes Annotated (West) §§ 41-1463, 41-1465 11

Arkansas Code of 1987 Annotated (LexisNexis) §§ 21-3-202 to 21-3-203 11

Code of Alabama, 1975 (West) §§ 25-1-20 to 25-1-21 11

Code of Iowa §§ 216.2, 216.6 13

Code of Laws of South Carolina 1976 Annotated. §§ 1-13-30, 1-13-80 18

Code of Virginia 1950 Annotated (LexisNexis) §§ 2.2-2639, 2.2-3903 19

Colorado Revised Statutes (LexisNexis) §§ 24-34-301, 24-34-401, 24-34-402 12

Delaware Code Annotated (LexisNexis) title 19, §§ 710, 711 12

District of Columbia Official Code (West) §§ 2-1401.02, 2-1402.11 12

Florida Statutes §§ 760.02, 760.10, § 112.044 12

General Laws of Massachusetts chapter 151B, §§ 1, 4 14

General Laws of Rhode Island (LexisNexis) §§ 28-5-6, 28-5-7 18

General Statutes of Connecticut §§ 46a-51, 46a-60 12

General Statutes of North Carolina (LexisNexis) §§ 126-16, 143-422.2 17

Hawaii Revised Statutes §§ 378-1 to 378-2 13

Idaho Code Annotated (LexisNexis) §§ 67-5902, 67-5909, 67-5910 13

Indiana Code §§ 22-9-2-1 to -2 13

Kansas Statutes Annotated §§ 44-1112 to 44-1113 14

LexisNexis Louisiana Revised Annotated Statutes (LexisNexis) §§ 23:302, 23:311 to 23:312 14

McKinney's Consolidated Laws of New York Annotated (West) Executive § 296 16

Michie's Annotated Code of Maryland (LexisNexis), State Government §§ 20-601, 20-606 14

Michigan Compiled Laws (1979) § 37.2202 15

Minnesota Statutes §§ 43A.01, 181.81, 363A.03, 363A.08, 363A.03, ... 15

Mississippi Code 1972 Annotated (LexisNexis) § 25-9-149 15

Missouri Revised Statutes §§ 213.010, 213.055 15

Montana Code Annotated §§ 49-2-101, 49-2-303,§ 49-3-201 15

Nevada Revised Statutes §§ 281.370, 613.310, 613.330 16

New Hampshire Revised Statutes Annotated (West) §§ 354-A:2, 354-A:7 16

New Jersey Statutes Annotated (West) §§ 10:3-1, 10:5-5, 10:5-12 16

New Mexico Statutes Annotated 1978 (Conway Green) § 28-1-7 16

North Dakota Century Code (LexisNexis) §§ 14-02.4-02 to 14-03.4-02 17

Official Code of Georgia Annotated (LexisNexis) §§ 34-1-2, 45-19-22, 45-19-28, 45-19-29 12

Oklahoma Statutes (West) title 25, §§ 1301, 1302; title 74 § 954 17

Oregon Revised Statutes §§ 659A.030,§ 240.306 17

Page's Ohio Revised Code Annotated (LexisNexis) §§ 4112.01, 4112.02 17

Revised Code of Washington §§ 49.44.090, 49.60.040, 49.60.180 19

Revised Statutes of Nebraska §§ 48-1002 to 48-1004 15

Tennessee Code Annotated (LexisNexis) §§ 4-21-101, 4-21-401 18

Utah Code Annotated (LexisNexis) §§ 34A-5-102, 34A-5-106 18

Vermont Statutes Annotated title 21, §§ 495, 495d 19

Vernon's Texas Labor Code Annotated §§ 21.002, 21.101 18

West Virginia Code §§ 5-11-3, 5-11-9 19

West's Annotated California Codes Government §§ 12926, 12940 11

West's Maine Revised Statutes title 5, §§ 4553, 4572, 7051 14

Wisconsin Statutes §§ 111.32 to 111.33, 111.321 19

Wyoming Statutes Annotated §§ 27-9-102, 27-9-105 20

Other Statutes

22 Guam Code Annotated §§ 3301, 3302, 5101, 5201 20

Laws of Puerto Rico Annotated (LexisNexis) title 3, § 1462b; title 29, §§ 146, 151 20

Virgin Islands Code Annotated (LexisNexis) title 10, §§ 64, 64a 20

Other Authorities

South Dakota Constitution article VI, § 18 11

INTEREST OF *AMICI CURIAE*

The *amici* states and their municipalities employ millions of Americans. Each of the *amici* has adopted statutes, rules, and regulations prohibiting discrimination on the basis of age by its constituent branches, departments, agencies, and political subdivisions. Most *amici* have fair-employment-practices agencies responsible for the enforcement of state and federal anti-discrimination laws against state and local government employers. Thus, through their laws, regulations, and practices, *amici* demonstrate their commitment to eradicating unlawful discrimination in public employment.[1]

In enacting the Age Discrimination in Employment Act, or ADEA, Congress prioritized the voluntary resolution of employment disputes over litigation. Specifically, the ADEA requires an employee to make a charge of discrimination to the Equal Employment Opportunity Commission before filing a lawsuit. The ADEA further requires that the EEOC "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626. Additionally, the ADEA imposes a duty of notice and ensures the timely initiation of claims.

The Seventh Circuit allows government employees to bypass the ADEA's comprehensive remedial scheme and seek relief under 42 U.S.C. § 1983. The *amici* states seek reversal of the Seventh Circuit and a holding that the ADEA provides the exclusive federal remedy for age-discrimination claims made against state and local government employers.

---

[1] The parties were notified of the intent to file at least 10 days

INTRODUCTION AND SUMMARY OF ARGUMENT

The ADEA creates a far-reaching and detailed statutory scheme for resolving age discrimination. It provides an administrative framework that favors notice, informal resolution of disputes, and timely initiation and resolution of claims. In 1974, Congress extended the ADEA to state and municipal employees.

By contrast, § 1983 creates no substantive rights or protections for the public. Section 1983 is merely a vehicle for the protection of rights granted by other federal laws.

Acknowledging that overlap, the circuits have already established that the ADEA provides the exclusive remedy for age-discrimination claims by employees against the federal government. E.g., *Tapia-Tapia* v. *Potter*, 322 F.3d 742, 746 (1st Cir. 2003). And the majority of circuits to consider the matter have also extended the ADEA's exclusivity to state and local governments. But the Seventh Circuit and districts courts in other circuits have taken the opposite tack, allowing state and local government employees to circumvent the ADEA's comprehensive scheme. As a result, states and municipalities are subject to different federal suits based on nothing more than the circuit where they happen to be located.

Under the Seventh Circuit's analysis, the *amici*—alone among the nation's employers—are deprived of the benefits the ADEA's comprehensive administrative process provides. That approach flies

in the face of this Court's jurisprudence, which makes clear that Congress' creation of a comprehensive statutory scheme precludes the use of § 1983 to vindicate identical rights.

This Court should intervene to end the conflict among the circuits and to restore the ADEA's comprehensive nature and benefits to all state and municipal governments. Accordingly, the *amici* states respectfully request that the Court grant Illinois' petition for a writ of certiorari.

ARGUMENT

I. The Court should grant the petition and resolve the split among the circuits regarding whether the ADEA precludes age-discrimination claims under § 1983.

The Seventh Circuit's decision below creates a conflict among the circuit courts on the matter of whether the ADEA precludes relief under § 1983 for age-discrimination claims. App. 23a. Contrary to the Seventh Circuit's decision here, the Fourth, Fifth, Ninth, and Tenth Circuits have all held that the ADEA's comprehensive remedial scheme precludes relief for age discrimination under § 1983. *Ahlmeyer* v. *Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1057 (9th Cir. 2009); *Migneault* v. *Peck*, 158 F.3d 1131, 1140 (10th Cir. 1998), *vacated on other grounds sub. nom. Bd. of Regents of the Univ. of N.M.* v. *Migneault*, 582 U.S. 1110 (2000); *Lafluer* v. *Tex. Dep't Health*, 126 F.3d 758, 760 (5th Cir. 1997); *Zombro* v. *Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir. 1989).

Two other circuits that have not addressed whether the ADEA precludes age-discrimination claims against the states under § 1983 have held that the ADEA precludes *federal* employees from asserting constitutional age-discrimination claims. The First Circuit held that the ADEA precludes a federal employee from asserting an age-discrimination claim under the Fifth Amendment. *Tapia-Tapia*, 322 F.3d at 746 ("The ADEA provides the exclusive federal remedy for age discrimination in employment."). Likewise, in holding that a plaintiff must exhaust his administrative remedies under the ADEA, the District of Columbia Circuit stated, "It is undisputed that the ADEA provides the exclusive remedy for a federal employee who claims age discrimination." *Chennareddy* v. *Bowsher*, 935 F.2d 315, 318 (D.C. Cir. 1991) (citing *Zombro*, 868 F.2d at 1369).

The Seventh Circuit is the only circuit since the ADEA's enactment to hold that a government employee may bring an age-discrimination claim under § 1983 though, as noted in the petition, district courts in the remaining circuits—Second, Third, Sixth, Eighth, and Eleventh—are divided on the question. Pet. 9–12.

Thus, whether a state or municipality may be subjected to suit under both the ADEA and § 1983 depends entirely on its location. The Court should grant the petition to resolve the conflict among the lower courts and ensure that all the states and municipalities receive the benefits of the ADEA's administrative process as Congress intended.

II. The Seventh Circuit erred by distinguishing between constitutional and statutory claims.

The Seventh Circuit's analysis of whether the ADEA precludes a government employee from asserting an age-discrimination claim via the procedural vehicle of § 1983 errs because it creates a distinction between constitutional and statutory rights. That distinction is inconsistent with this Court's jurisprudence.

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Redress under § 1983 is only available if the plaintiff can demonstrate that the Constitution or a federal statute creates an individually enforceable right in the class of beneficiaries to which the plaintiff belongs. *Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005). Even then, "there is only a rebuttable presumption that the right is enforceable under § 1983" because Congress may expressly or impliedly have forbidden recourse to § 1983. *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997).

The critical inquiry for determining whether statutory enactments preclude claims under § 1983 is congressional intent. *Fitzgerald* v. *Barnstable School Committee*, 555 U.S. 246, 252 (2009); *Smith* v.

Robinson, 468 U.S. 992, 1012 (1984) (citing *Brown* v. *Gen. Servs. Admin.*, 425 U.S. 820, 825–29 (1976)). Evidence of congressional intent can be found in the statutory text, *Rancho Palos Verdes*, 544 U.S. at 120; inferred because individual enforcement under § 1983 "would be inconsistent with Congress' carefully tailored scheme," *Smith*, 468 U.S. at 1012; and "confirmed by a statute's context," *Fitzgerald*, 555 U.S. at 253. The Court has further explained that where the § 1983 claim asserts a constitutional violation, "lack of congressional intent [to preclude a § 1983 action] may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." *Id.* at 252–53. This Court has applied this approach consistently regardless of whether the cause of action at issue is based on a statutory right or a constitutional right.

The Seventh Circuit erred by applying a heightened preclusion analysis for constitutional claims: "For the preclusion of *constitutional* claims, we believe more is required than a comprehensive statutory scheme." App. 27a (emphasis added); accord App. 25a ("[W]e have a hard time concluding that Congress's mere creation of a statutory scheme for age discrimination claims was intended to foreclose preexisting constitutional claims."); App. 28a ("In sum, even though the ADEA is a comprehensive remedial scheme, without some additional indication of congressional intent, we cannot say that the ADEA's scheme alone is enough to preclude § 1983 constitutional claims.").

In contrast, this Court has made the same inquiry—focusing on congressional intent—whether considering a constitutional or statutory claim. One part of this congressional-intent inquiry is whether a comprehensive statutory scheme exists. The congressional intent inferred from a comprehensive remedial scheme does not change because of the nature of the claim considered. Compare *Smith*, 468 U.S. at 1012 (constitutional right), with *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (statutory right).

The Seventh Circuit believes that *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and *Smith* v. *Robinson*, 468 U.S. 992 (1984), demonstrate that constitutional claims receive different treatment, noting that the statutes at issue in those cases "were specifically designed to address constitutional issues," and that this Court also looked to other indicia of congressional intent. App. 26a–28a. But a review of *Preiser* and *Smith* demonstrates that constitutional claims receive the same congressional-intent inquiry as statutory claims. The comprehensive nature of the statutory scheme was the primary factor behind the Court's holdings in both cases.

In *Preiser*, the Court emphasized that § 1983 is a "general" statute. 411 U.S. at 489. By contrast, the federal *habeas corpus* statute "explicitly and historically" provides a remedy for a state prisoner to attack his confinement on constitutional grounds. *Id.* The Court explained:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of

> adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

Id. at 489–90.

Smith reached the same conclusion regarding § 1983 and the Education of the Handicapped Act ("EHA") and § 1983. The EHA establishes a "comprehensive scheme" and creates "a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." 468 at 1009–11. Allowing § 1983 claims would "render superfluous most of the detailed procedural protections outlined in the statute." *Id.* at 1011. "No federal district court presented with a constitutional claim to a public education can duplicate that process" and achieve Congress' objective of "having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *Id.* at 1011–12. And in so holding, *Smith* relied on cases considering statutory rights. *Id.* at 1012 (citing *Brown*, 425 U.S. at 825–29, and *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 151, n. 5 (1970)).

Nor has this Court drawn the distinction suggested by the Seventh Circuit between constitutional and statutory claims in later cases. Indeed, in cases in which the Court analyzed whether statutory claims were precluded, the Court relied on *Preiser* and *Smith*. E.g., *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005) (citing *Smith*, 468 U.S. at 1012); *Brown*, 425 U.S. at 833 (citing *Preiser*, 411 U.S. at 489–90).

Thus, the Seventh Circuit erred in using *Smith* and *Preiser* to justify a different standard for discerning § 1983 preclusion when the underlying claim asserts a constitutional violation. App. 23a–28a. The comprehensive nature of a statutory scheme is evidence of congressional intent to preclude § 1983 suits for both statutory and constitutional claims. Compare *Ranch Palos Verdes*, 544 U.S. at 120 ("Our cases have explained that evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'"), with *Smith*, 468 U.S. at 1012–13 (EHA's "carefully tailored scheme" demonstrated Congress' intent).

The Court should grant the petition and reverse the Seventh Circuit's erroneous reasoning and result.

III. State and local governments require uniform treatment in their important role as employers.

Under the Seventh Circuit's analysis, state and municipal governments—alone among employers—are denied the benefits of the ADEA's comprehensive scheme, and its encouragement of "conciliation, conference, and persuasion," 29 U.S.C. § 626. Under the Seventh Circuit's rule, all private employees must exhaust their administrative remedies under state law before filing suit, but public employees need not do so. See 29 U.S.C. § 633(b).

The disparate treatment of state and local governments is incongruous because employment is an area where state and local governments "have far broader powers" than in most other contexts in which § 1983 applies. *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id.*

Thus, in this sensitive government activity, the states and municipalities should not be afforded *fewer* benefits and protections than those afforded to all other employers. See *Zombro*, 868 F.2d at 1369–70 (basing preclusion of § 1983 in part on government employers' need for "wide discretion").

Moreover, the Seventh Circuit's reasoning frees state employees from fulfilling the administrative or other requirements of each state's own statute prohibiting age discrimination in employment. Every state and territory but one has a statute that bars age discrimination against public employees, as does the District of Columbia:[2]

Alabama: Ala. Code §§ 25-1-20 to -21 (prohibiting private and public employers from discriminating against persons 40 years of age and older).

Alaska: Alaska Stat. §§ 18.80.220, .300 (prohibiting private and public employers, including the state and a political subdivision of the state, from discriminating on the basis of age).

Arizona: Ariz. Rev. Stat. Ann. §§ 41-1463, -1465 (prohibiting private and public employers from discriminating against persons 40 years of age and older).

Arkansas: Ark. Code Ann. §§ 21-3-202 to -203 (prohibiting public employers from discriminating against persons 40 years of age and older).

California: Cal. Gov't Code (Deering) §§ 12926, 12940 (prohibiting private and public employers, including cities and the state or any political or civil

---

[2] South Dakota's anti-discrimination statute does not include age as a protected class. But the South Dakota Constitution's equal-protection clause prohibits age discrimination to the same extent as the United States Constitution. See S.D. Const. art. VI, § 18; *Lyons* v. *Lederle Labs.*, 440 N.W.2d 769, 771 (S.D. 1989).

subdivision of the state. from discriminating against persons over 40 years of age).

Colorado: Colo. Rev. Stat. §§ 24-34-301, -401, -402 (prohibiting private and public employers, including the state or any political subdivision, commission, department. institution, or school district thereof, from discriminating against persons at least 40 but less than 70 years of age).

Connecticut: Conn. Gen. Stat. §§ 46a-51, 46a-60 (prohibiting private and public employers, including the state and all political subdivisions, from discriminating on the basis of age).

Delaware: Del. Code Ann. tit. 19, §§ 710, 711 (prohibiting private and public employers, including the state or any political subdivision or board, department, commission, or school district thereof, from discriminating against persons 40 or more years of age).

District of Columbia: D.C. Code §§ 2-1401.02, 2-1402.11 (prohibiting private and public employers from discriminating against persons 18 years of age or older).

Florida: Fla. Stat. §§ 760.02, .10; § 112.044 (prohibiting the private and public employers, including the state, counties, municipalities, and special districts or any subdivision or agency thereof, from discriminating on the basis of age).

Georgia: Ga. Code Ann. §§ 34-1-2; 45-19-22, -28, -29 (prohibiting private and public employers, including any department, board, bureau,

commission, authority, or other agency of the state, from discriminating against persons between 40 and 70 years of age).

Hawaii: Haw. Rev. Stat. §§ 378-1 to -2 (prohibiting private and public employers, including the state or any of its political subdivisions, from discriminating on the basis of age).

Idaho: Idaho Code Ann. §§ 67-5902, -5909, -5910 (prohibiting private and public employers, including any agency of or any governmental entity within the state, from discriminating against persons 40 years of age and older).

Illinois: 775 Ill. Comp. Stat. 5/1-103, /2-101 to -102 (prohibiting private and public employers, including the state and any political subdivision, municipal corporation, or other governmental unit or agency, from discriminating against persons 40 years of age and older, but in the case of training or apprenticeship programs, age means 18 but not yet 40 years old).

Indiana: Ind. Code §§ 22-9-2-1 to -2 (prohibiting private and public employers, including the state and all political subdivisions, boards, departments, and commissions thereof, from discriminating against persons at least 40 but under 75 years of age).

Iowa: Iowa Code §§ 216.2, .6 (prohibiting private and public employers, including the state or any political subdivision, board, commission, department, institution, or school district thereof, from discriminating against persons 18 and over and persons considered by law to be an adult).

Kansas: Kan. Stat. Ann. §§ 44-1112 to -1113 (prohibiting private and public employers, including the state and all political subdivisions of the state, from discriminating against persons 40 or more years of age).

Kentucky: Ky. Rev. Stat. Ann. §§ 18A.140, 344.030, .040 (West) (prohibiting private and public employers, including state employers, from discriminating against persons age 40 and over).

Louisiana: La. Rev. Stat. Ann. §§ 23:302, :311 to :312 (prohibiting private and public employers, including the state or any state agency, board, commission, or political subdivision of the state, from discriminating against persons at least 40 years of age).

Maine: Me. Rev. Stat. tit. 5, §§ 4553, 4572, 7051 (prohibiting private and public employers from discriminating on the basis of age and barring discrimination on account of age in state classified and unclassified employment).

Maryland: Md. Code Ann., State Gov't §§ 20-601, -606 (LexisNexis) (prohibiting private and public employers, including the state, from discriminating on the basis of age).

Massachusetts: Mass. Gen. Laws ch. 151B, §§ 1, 4 (prohibiting private and public employers, including the commonwealth and all political subdivisions, boards, departments, and commissions thereof, from discriminating against persons greater than 40 years of age).

Michigan: Mich. Comp. Laws § 37.2202 (prohibiting private and public employers from discriminating on the basis of age).

Minnesota: Minn. Stat. §§ 363A.08, .03 (prohibiting private and public employers from discriminating against persons over the age of majority); § 181.81 (prohibiting private employers from refusing to hire or discharging or demoting an individual because such individual has reached an age less than 70); § 43A.01 (providing that personnel actions by state employers must be based on the ability to perform duties without regard to age).

Mississippi: Miss. Code Ann. § 25-9-149 (prohibiting state employers from discriminating on the basis of age).

Missouri: Mo. Rev. Stat. §§ 213.010, .055 (prohibiting private and public employers, including the state or any political or civil subdivision thereof, from discriminating against persons 40 or more years of age, but less than 70 years of age).

Montana: Mont. Code Ann. §§ 49-2-101, -303 (prohibiting private and public employers from discriminating on the basis of age); § 49-3-201 (providing that state and local government officials shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit without regard to age).

Nebraska: Neb. Rev. Stat. §§ 48-1002 to -1004 (prohibiting private and public employers, including the state, governmental agencies, and political subdi-

visions, from discriminating against persons 40 years of age or more).

Nevada: Nev. Rev. Stat. §§ 613.310, .330 (prohibiting private and public employers from discriminating on the basis of age); § 281.370 (providing that state, county, or municipal departments, housing authorities, agencies, and boards or appointing officers thereof, shall not refuse to hire or discharge a person from employment, or discriminate in compensation or terms of employment, because of a person's age).

New Hampshire: N.H. Rev. Stat. Ann. §§ 354-A:2, -A:7 (prohibiting private and public employers, including the state and all political subdivisions, boards, departments, and commissions thereof, from discriminating on the basis of age).

New Jersey: N.J. Stat. Ann. §§ 10:5-5, -12 (West) (prohibiting private and public employers, including the state and any political or civil subdivision thereof, from discriminating on the basis of age); § 10:3-1 (prohibiting state, county, and municipal employers from discriminating against individuals of least 40 years of age).

New Mexico: N.M. Stat. Ann. § 28-1-7 (prohibiting private and public employers from discriminating on the basis of age).

New York: N.Y. Exec. Law § 296 (McKinney) (prohibiting private and public employers from discriminating on the basis of age).

North Carolina: N.C. Gen. Stat. § 143-422.2 (providing that it is the public policy of the state to protect the right of all persons to seek, obtain, and hold employment without discrimination on the basis of age by private and public employers); § 126-16 (prohibiting state departments and agencies and local political subdivisions of the state from discriminating against individuals at least 40 years of age).

North Dakota: N.D. Cent. Code §§ 14-02.4-02 to -03 (prohibiting private and public employers from discriminating against individuals at least 40 years of age).

Ohio: Ohio Rev. Code Ann. §§ 4112.01, .02 (LexisNexis) (prohibiting private and public employers, including the state and any political subdivision of the state, from discriminating against individuals at least 40 years old).

Oklahoma: Okla. Stat. tit. 25, §§ 1301, 1302 (prohibiting private and public employers from discriminating against persons at least 40 years of age); tit. 74, § 954 (prohibiting any department or agency of the state from discriminating against persons on the basis of age).

Oregon: Or. Rev. Stat. § 659A.030 (prohibiting private and public employers from discriminating against individuals 18 years of age or older); § 240.306 (providing that state employers' recruiting, selecting, and promoting employees for state classified service must be without regard to an individual's age).

Pennsylvania: 43 Pa. Cons. Stat. §§ 954, 955 (prohibiting private and public employers, including the commonwealth or any political subdivision or board, department, commission, or school district thereof, from discriminating against individuals 40 years of age or older and those protected by further amendment to the federal Age Discrimination in Employment Act).

Rhode Island: R.I. Gen. Laws §§ 28-5-6, 28-5-7 (prohibiting private and public employers, including the state and all political subdivisions of the state, from discriminating against persons at least 40 years of age).

South Carolina: S.C. Code Ann. §§ 1-13-30, -80 (prohibiting private and public employers from discriminating against persons at least 40 years of age).

Tennessee: Tenn. Code Ann. §§ 4-21-101, -401 (prohibiting private and public employers, including the state or any political or civil subdivision thereof, from discriminating against persons at least 40 years of age).

Texas: Tex. Lab. Code Ann. §§ 21. 002, .101 (West) (prohibiting private and public employers, including counties, municipalities, state agencies, state instrumentalities, and individuals elected to public office of the state or a political subdivision of the state, from discriminating against persons 40 years of age or older).

Utah: Utah Code Ann. §§ 34A-5-102, -106 (LexisNexis) (prohibiting private and public employers, including the state, any political

subdivision of the state, and a board, commission, department, institution, school district, trust, or agent of the state or its political subdivisions, from discriminating against persons 40 years of age or older).

Vermont: Vt. Stat. Ann. tit. 21, §§ 495, 495d (prohibiting private and public employers, including any governmental body, from discriminating against persons 18 years of age or older).

Virginia: Va. Code Ann. § 2.2-3903 (prohibiting employment practices that violate any Virginia or federal statute or regulation governing age discrimination); § 2.2-2639 (prohibiting employers of more than five but less than fifteen persons from discharging any employee on the basis of age if the employee is 40 years of age or older).

Washington: Wash. Rev. Code §§ 49.44.090, 49.60.040, 49.60.180 (prohibiting private and public employers from discriminating against persons 40 years of age or older).

West Virginia: W. Va. Code §§ 5-11-3, -9 (prohibiting private and public employers, including state, or any political subdivision thereof, from discriminating against persons 40 years of age and older).

Wisconsin: Wis. Stat. §§ 111.32 to .33, 111.321 (prohibiting private and public employers, including the state and each agency of the state, from discriminating against persons at least age 40 or over).

Wyoming: Wyo. Stat. Ann. §§ 27-9-102, -105 (prohibiting private and public employers, including the state or any political subdivision or board, commission, department, institution, or school district thereof, from discriminating against persons at least 40 years of age).

Guam: 22 Guam Code Ann. §§ 5101, 5201 (prohibiting private employers from discriminating on the basis of age); §§ 3301, 3302 (prohibiting private employers and the territory of Guam or any authority, board, commission, department, or institution thereof, from discriminating on the basis of age).

Puerto Rico: P.R. Laws Ann. tit. 29, §§ 146, 151 (prohibiting private employers from discriminating against persons who have reached the minimum age that minors are legally allowed to work); tit. 3, § 1462b (providing that public employers must select, train, promote, and retain employees based on merit, without discrimination by reason of age).

Virgin Islands: V.I. Code Ann. tit 10, §§ 64, 64a (prohibiting private and public employers, including the government and its instrumentalities, from discriminating on the basis of age).

Thus, even in the absence of § 1983 and the ADEA, Respondent Levin was free to pursue his age-discrimination claims under Illinois law. The Illinois Human Rights Act protects against age discrimination, including claims relating to assistant attorneys general. 775 Ill. Comp. Stat. § 5/2-101(2); See *Office of Lake Cnty. State's Attorney* v. *Human Rights Comm'n*, 601 N.E.2d 1294, 1303 (Ill. App. Ct.

1992) (assistant state's attorney was an "employee" within meaning of the Human Rights Act).

In sum, the Seventh Circuit has concluded that Congress intended to allow state and local government employees asserting age-discrimination claims to circumvent not only the administrative requirements of the ADEA, but also any applicable state law. Further, the Seventh Circuit imputes this motive to the same Congress that requires all private and federal government employees to fulfill these requirements. This result is incorrect and, if left uncorrected, will undermine the uniform application of federal anti-discrimination law to state employees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Matthew T. Nelson
Nicole L. Mazzocco
Special Assistant Attorneys General
Warner Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503
(616) 752-2000

Attorneys for *Amicus Curiae* State of Michigan

Dated: FEBRUARY 2013

PETITIONER'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUN - 3 2013
OFFICE OF THE CLERK

No. 12-872

In the Supreme Court of the United States

LISA MADIGAN, in her individual capacity, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,
PETITIONERS,

v.

HARVEY LEVIN,
RESPONDENT.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
CLIFFORD W. BERLOW
MATTHEW P. BECKER
Ass't Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

Attorneys for Petitioners

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES. v

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED. 2

STATEMENT. 2

SUMMARY OF ARGUMENT. 9

ARGUMENT. 11

I. A Statute That Creates A Comprehensive Remedial Regime Displaces Competing Claims Under § 1983. 11

II. The ADEA Creates A Comprehensive Remedial Regime That Displaces § 1983 Claims. 19

A. The ADEA Establishes An Exhaustive Remedial Regime That Favors Informal Conflict Resolution And Gives The EEOC Substantial Control Over Federal Age Discrimination Claims. 20

TABLE OF CONTENTS—Continued

B. Congress Added Still More To The ADEA's Remedial Regime By Focusing On The Proper Scope And Form Of Federal Age Discrimination Claims Available To Public Employees..... 27

C. Section 1983 Claims For Age Discrimination Would Allow Plaintiffs To Circumvent Congress' Comprehensive Remedial Regime, At Substantial Cost To Public Employers.. 34

1. Section 1983 Equal Protection Claims For Age Discrimination Would Circumvent Congress' Carefully Constructed Remedial Regime..... 34

2. The Equal Protection Clause Offers Little Likelihood Of Success On Age Discrimination Claims, But These Easily Pled Claims Impose Substantial Costs On Public Employers..... 38

III. The Seventh Circuit Misread This Court's Decisions In *Fitzgerald* and *Smith*..... 45

CONCLUSION..... 52

TABLE OF CONTENTS—Continued

APPENDICES. 1a

A. U.S. Const. amend. XIV, § 1. . . . . 1a

B. 42 U.S.C. § 1983. . . . . 2a

C. 29 U.S.C. § 621 *et seq*. 3a

D. 29 U.S.C. §§ 211, 216, 217. . . . . 48a

E. 42 U.S.C. § 2000e-16a *et seq*. 57a

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ahlmeyer v. Nev. Sys. of Higher Educ.,
555 F.3d 1051 (9th Cir. 2009)..... 6, 38

Anderson v. Sara Lee Corp.,
508 F.3d 181 (4th Cir. 2007)..... 27

Ashcroft v. Iqbal, 556 U.S. 662 (2009)..... 41, 43, 44

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007)..... 41, 42

Blessing v. Freestone,
520 U.S. 329 (1997)..... 11-12, 12

Bd. of Cnty. Commr's v. EEOC,
405 F.3d 840 (10th Cir. 2005)..... 30

Bogan v. Scott-Harris, 523 U.S. 44 (1998)..... 43

Borough of Duryea v. Guarnieri,
131 S. Ct. 2488 (2011)..... 39, 50

Britt v. Grocers Supply Co., Inc.,
978 F.2d 1441 (5th Cir. 1992)..... 35

Bush v. Lucas, 462 U.S. 367 (1983)..... 37, 51

Butler v. N.Y. State Dep't of Law,
211 F.3d 739 (2d Cir. 2000)..... 29

TABLE OF AUTHORITIES—Continued

C.I.R. v. Schleier,
515 U.S. 323 (1995) 25

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005) . . . . . *passim*

Connick v. Myers, 461 U.S. 138 (1983) 39

Correa-Ruiz v. Fortuno,
573 F.3d 1 (1st Cir. 2009) 30

Delta Airlines, Inc. v. August,
450 U.S. 346 (1981) 42

Dyer v. Radcliffe,
169 F. Supp. 2d 770 (S.D. Ohio 2001) 32

EEOC v. Bd. of Regents of the Univ. of Wis.,
288 F.3d 296 (7th Cir. 2002) 50

EEOC v. Commercial Office Prods. Co.,
486 U.S. 107 (1988) 24

EEOC v. Massachusetts,
858 F.2d 52 (1st Cir. 1988) 29, 30

Engquist v. Or. Dep't of Agric.,
553 U.S. 591 (2008) 39, 42, 50

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008) 21

TABLE OF AUTHORITIES—Continued

Fitzgerald v. Barnstable Sch. Comm.,
555 U.S. 246 (2009). . . . . *passim*

Frye v. Grandy,
625 F. Supp. 1573 (D. Md. 1986). 22, 35

Garcetti v. Ceballos, 547 U.S. 410 (2006). 39

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004). 21

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991). 22

Golden State Transit Corp. v. Los Angeles,
493 U.S. 103 (1989). 11

Gordon v. Kaleida Health,
847 F. Supp. 2d 479 (W.D.N.Y. 2012). 27

Great Am. Fed. Sav. & Loan Ass'n v. Novotny,
442 U.S. 366 (1979). 17

Gregory v. Ashcroft, 501 U.S. 452 (1991). . . 29, 30, 40

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993). 21

Herman v. RSR Sec. Servs. Ltd.,
172 F.3d 132 (2d Cir. 1999). 26, 27

TABLE OF AUTHORITIES—Continued

Intel Corp. v. Advanced Micro Devices,
542 U.S. 241 (2004). 42

Kaimowitz v. Bd. of Trs. of the Univ. of Ill.,
951 F.2d 765 (7th Cir. 1992). 24

Kendall v. City of Chesapeake,
174 F.3d 437 (4th Cir. 1999). 26, 27

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000). . . . . *passim*

Knepper v. Rite Aid Corp.,
675 F.3d 249 (3d Cir. 2012). 27

Lafleur v. Tex. Dep't of Health,
126 F.3d 758 (5th Cir. 1997). 6

Lerwill v. Inflight Motion Pictures, Inc.,
343 F. Supp. 1027 (N.D. Cal. 1972). 26

Lorillard v. Pons, 434 U.S. 575 (1978). 20, 22

Love v. Pullman Co., 404 U.S. 522 (1972). 24

Maine v. Thiboutot, 448 U.S. 1 (1980). 11

Marion Cnty. Coroner's Office v. EEOC,
612 F.3d 924 (7th Cir. 2010). 32

TABLE OF AUTHORITIES—Continued

Mass. Bd. of Retirement v. Murgia,
427 U.S. 307 (1976). 39-40, 48

McQuiggin v. Perkins,
No. 12-126 (U.S. 2013). 33

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). . . . . *passim*

Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998), vacated on other grounds *sub nom. Bd. of Regents of Univ. of N.M. v. Migneault*, 528 U.S. 1110 (2000). 6

Mitchell v. Forsyth, 472 U.S. 511 (1985). 1

Montano-Perez v. Durrett Cheese Sales, Inc.,
666 F. Supp. 2d 894 (M.D. Tenn. 2009). 27

Nat'l Aeronautics & Space Admin. v. Nelson,
131 S. Ct. 746 (2011). 39

Northwest Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77 (1981). 26

Oscar Meyer Co. v. Evans,
441 U.S. 750 (1979). 23, 23-24, 24

Preiser v. Rodriguez,
411 U.S. 475 (1973). 7, 15, 34, 37

TABLE OF AUTHORITIES—Continued

Reichle v. Howards, 132 S. Ct. 2088 (2012). 1

Roman v. Maietta Constr., Inc.,
147 F.3d 71 (1st Cir. 1998). 27

Scheuer v. Rhodes, 416 U.S. 232 (1974). 41

Shapiro v. N.Y. City Dep't of Educ.,
561 F. Supp. 2d 413 (S.D.N.Y. 2008). 41

Skinner v. Switzer, 131 S. Ct. 1289 (2011). 41

Smith v. Robinson, 468 U.S. 992 (1984),
superceded by statute, PL 99-372,
100 Stat. 796 (1986).. . . . . *passim*

Smith v. Wade, 461 U.S. 30 (1983). 37

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002). 41, 42

Tapia-Tapia v. Potter,
322 F.3d 742 (1st Cir. 2003). 6

Vance v. Bradley, 440 U.S. 93 (1979). 40

Waters v. Churchill, 511 U.S. 661 (1994). 39

Watson v. U.S., 552 U.S. 74 (2007). 33

Wilkie v. Robbins, 551 U.S. 537 (2007). 1

TABLE OF AUTHORITIES—Continued

Zombro v. Baltimore City Police Dep't,
868 F.2d 1364 (4th Cir. 1989)..... 6-7, 20, 32, 35

Statutes and Regulations:

5 U.S.C. §§ 554-557..... 31

28 U.S.C. § 1254(1)..... 1

29 U.S.C. § 211(b)..... 25

29 U.S.C. § 216..... 25, 38

29 U.S.C. § 216(b)..... 26

29 U.S.C. § 217..... 25, 26

29 U.S.C. § 621..... 2

29 U.S.C. § 621(b)..... 21

29 U.S.C. § 623(j)..... 30, 48

29 U.S.C. § 626..... 2

29 U.S.C. § 626(b)..... *passim*

29 U.S.C. § 626(c)(1)..... 25

29 U.S.C. § 626(d)(1)..... 23

TABLE OF AUTHORITIES—Continued

29 U.S.C. § 626(d)(1)(A) 22

29 U.S.C. § 626(d)(2) 22

29 U.S.C. § 626(e) 25

29 U.S.C. § 626(f)(4) 25

29 U.S.C. § 630 28

29 U.S.C. § 630(f) 4, 28, 30, 48

29 U.S.C. § 633 2

29 U.S.C. § 633(b) 23

42 U.S.C. § 1983 . . . . . *passim*

42 U.S.C. § 2000e 29

42 U.S.C. § 2000e-16a through
42 U.S.C. § 2000e-16c. 2, 30

42 U.S.C. § 2000e-16b(b)(2) 30

42 U.S.C. § 2000e-16c(b)(1) 31

42 U.S.C. § 2000e-16c(b)(2) 31

42 U.S.C. § 2000e-16c(c) 31

TABLE OF AUTHORITIES—Continued

42 U.S.C. § 2000e-16c(d). 31, 32

29 C.F.R. § 1603.102(a). 31

29 C.F.R. § 1603.103(a). 31

29 C.F.R. §§ 1603.201-1603.217. 31

29 C.F.R. § 1603.217(a). 31

29 C.F.R. §§ 1603.301-1603.304. 31

29 C.F.R. § 1626.4. 24

29 C.F.R. § 1626.7(a). 23

29 C.F.R. § 1626.12. . . . . 22, 23

29 C.F.R. § 1626.13. 25

29 C.F.R. § 1626.15. 24

29 C.F.R. § 1626.15(b). 22, 23

29 C.F.R. § 1626.15(c). 23

29 C.F.R. § 1626.15(d). 25

29 C.F.R. § 1626.17. 25

29 C.F.R. § 1626.18(c). 25

TABLE OF AUTHORITIES—Continued

745 ILCS 5/1.5(a) (2010). 49

Other:

86 Stat. 103. 29

88 Stat. 74. 28

H.R. 1 § 109, 102d Cong. (1991). 33

S. 2104 § 11, 101st Cong. (1990). 33

S. 1745, S. Amend. 1287, 102d Cong. (1991). 32

113 Cong. Rec. 7076 (1967). 24

H.R. Rep. No. 805 (1967).. . . . . 21, 23

H.R. Rep. No. 102-40, pt. 1 (1991).. 33

H.R. Rep. No. 102-40, pt. 2 (1991).. 33

S. Rep. No. 723 (1967).. . . . . 21, 23

EEOC Dec. No. 78-42, EEOC Dec. P 6725, 1978 WL 5794 (EEOC Sept. 29, 1978). 29

EEOC Dec. No. 79-8, EEOC Dec. P 6739, 1978 WL 5829 (EEOC Oct. 20, 1978).. 29

TABLE OF AUTHORITIES—Continued

Kimel v. Fla. Bd. of Regents, Brief for Respondents, 1999 WL 631661. 45

David C. Miller, *Alone in its Field: Judicial Trend to Hold that the ADEA Preempts § 1983 in Age Discrimination in Employment Claims*, 29 Stetson L. Rev. 573 (2000). 27

1 Mark A. Rothstein, *et al.*, *Employment Law* (3d ed. 2004). 30

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial of qualified immunity (Pet. App. 1a-37a) is reported at 692 F.3d 607. The memorandum opinion of the United States District Court for the Northern District of Illinois denying qualified immunity (Pet. App. 38a-102a) is not reported.

JURISDICTION

The appellate court entered judgment on August 17, 2012. Pet. App. 1a. On November 6, 2012, Justice Kagan granted petitioners' motion to extend the filing date for the certiorari petition to and including January 14, 2013. The petition was timely filed on January 14, 2013, and granted on March 18, 2013. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

This is an interlocutory appeal from the denial of qualified immunity pursuant to the collateral order doctrine. See *Mitchell v. Forsyth*, 472 U.S. 511, 526-527 (1985). To establish a qualified immunity defense, a defendant may show either that the plaintiff failed to set forth a viable claim, or that the rights allegedly violated were not clearly established at the relevant time. See *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). In this case, petitioners contend that respondent cannot state a viable § 1983 age discrimination claim against them because no such claim is cognizable, and therefore this appeal falls within the collateral order doctrine. See *Wilkie v. Robbins*, 551 U.S. 537, 550 n.4 (2007) (whether to

recognize cause of action is proper question for interlocutory appeal from denial of qualified immunity).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The appendix attached hereto contains the text of the Equal Protection Clause, U.S. Const. amend. XIV, § 1; relevant portions of 42 U.S.C. § 1983; the text of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; relevant portions of the Fair Labor Standards Act, 29 U.S.C. §§ 211, 216, 217; and the text of the Government Employee Rights Act of 1991, 42 U.S.C. § 2000e-16a *et seq.*

STATEMENT

This case asks whether state and municipal employees may avoid the remedial regime established by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, by using 42 U.S.C. § 1983 and the Equal Protection Clause to bring age discrimination claims against their public employers. The ADEA creates procedures and remedies to redress age discrimination. Procedurally, the Act's notice and timing requirements encourage the EEOC and its state counterparts to resolve age-based employment disputes informally, before employees may file suit in court. See 29 U.S.C. §§ 626, 633. Congress also has created a specialized, administrative process that certain high-ranking public-sector officials must follow to vindicate their rights under the ADEA. See 42 U.S.C. § 2000e-16a through § 2000e-16c. Remedially, the ADEA offers several legal and equitable options, while it bars punitive damages in favor of a capped, liquidated

damages award. See 29 U.S.C. § 626(b). The question presented is whether Congress intended this regime to be exclusive, or whether state and local public-sector employees may use § 1983 equal protection claims to bypass it.

1. Respondent Harvey Levin was employed as an Assistant Illinois Attorney General from September 5, 2000, until his termination, with eleven other attorneys, on May 12, 2006. Pet. App. 2a-3a. He was 55 years old at the time he was hired in 2000. Pet. App. 3a. He held the position of Senior Assistant Attorney General at the time his employment was terminated. *Ibid.* Respondent claimed that he was replaced by a female attorney in her thirties, though no newly hired attorney assumed respondent's cases. Pet. App. 3a, 55a. Four of the twelve attorneys fired in May 2006 were under 40, and eight of the twelve were "substantially younger" than respondent. Pet. App. 78a.

Respondent filed an amended complaint in the United States District Court for the Northern District of Illinois, raising federal claims for both age and sex discrimination in the decision to terminate his employment. Doc. 16. As relevant to this appeal, he alleged that he was fired because of his age in violation of the ADEA, and, via § 1983, that his termination also violated the Equal Protection Clause of the Fourteenth Amendment. Doc. 16 at 1-9, 21-23. Petitioners claimed, in response, that respondent's "low productivity, excessive socializing, inferior litigation skills, and poor judgment led to his termination." Pet. App. 3a.

Petitioners moved, *inter alia*, to dismiss the ADEA claim on the ground that respondent is not an "employee" within the meaning of the statute because he was an "appointee on the policymaking level." Doc. 9 at 1; Doc. 10 at 3-7; see 29 U.S.C. § 630(f). Petitioners also moved to dismiss the equal protection count on the ground that the ADEA displaced any competing, constitutional claim for age discrimination under § 1983. Doc. 36 at 2; Doc. 37 at 4-6. In the alternative, petitioners argued that qualified immunity shielded them from respondent's § 1983 claim for damages. Doc. 36 at 2; Doc. 37 at 10-12.

2. The district court initially denied petitioners' motion to dismiss the ADEA claim, reasoning that, although respondent was a policymaker, Doc. 55 at 6, he was not appointed by the Attorney General, *id.* at 7-9, and therefore did not fall within the exemption from ADEA coverage for appointed policymakers.

Turning to the equal protection claim, the district court recognized the series of decisions from this Court, see, *e.g.*, *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), holding that a federal statute may implicitly foreclose § 1983 as an alternative remedy for the class of injury that the statute redresses. Pet. App. 125a-126a. And the court acknowledged that whether the *Sea Clammers* rule forecloses § 1983 claims in this context is a question over which federal courts are currently split. Pet. App. 122a-125a. Specifically, although "[s]everal courts of appeals"—all to address the issue—"have held that the ADEA provides the exclusive remedy for age discrimination claims and therefore precludes age

discrimination suits brought under § 1983," Pet. App. 122a-123a, district courts in other circuits remain "deeply divided" over the question, Pet. App. 123a. Ultimately, the district court here rejected the unanimous decisions of the federal appellate courts and held that the ADEA does not foreclose § 1983 equal protection claims for alleged age discrimination. Pet. App. 124a-125a. In light of the nationwide uncertainty on this issue, however, the court awarded petitioners qualified immunity on respondent's § 1983 claim. Pet. App. 133a.

3. In response to petitioners' motion for summary judgment, the district court revisited its initial conclusion that respondent was an "employee" within the meaning of the ADEA and determined instead that he was an appointee. Pet. App. 57a, 59a-68a. Accordingly, the court granted summary judgment to petitioners on respondent's ADEA claim. Pet. App. 68a.

Turning to respondent's equal protection claim, the court reiterated its holding that the ADEA does not displace § 1983 equal protection claims for age discrimination in public employment. Pet. App. 57a. But the court went on to reverse its earlier determination that petitioners were entitled to qualified immunity based on the legal uncertainty over whether such displacement is proper. Pet. App. 70a-73a.

The court also held that respondent met the minimal showing required to defeat summary judgment on the equal protection claim. Pet. App. 84a-93a. Among other things, the court noted that respondent identified a single similarly situated employee who,

although 49 years old, was "substantially younger" than respondent was when he was fired, but who was not herself fired despite having comparable scores on the most recent performance review. Pet. App. 82a, 86a. And the court determined that respondent "manage[d] to create a dispute of material fact" by contesting petitioners' claims that his job performance was lacking, despite the fact that "a good deal of Levin's evidence on this issue is exclusively his own testimony." Pet. App. 89a-90a. The court "emphasize[d] that summary judgment determinations are made by viewing the evidence in the light most favorable to the non-movant," and that a "jury might well find otherwise at a trial where this evidence is not automatically viewed" in respondent's favor and where respondent bears the burden of proof. Pet. App. 101a-102a.

4. Petitioners filed an interlocutory appeal from the denial of qualified immunity, and the Seventh Circuit affirmed the holding that the ADEA does not displace § 1983 equal protection claims for age discrimination. The court acknowledged that, while the displacement question was one of first impression in that circuit, "[a]ll other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims." Pet. App. 20a (citing *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009); *Tapia-Tapia v. Potter*, 322 F.3d 742 (1st Cir. 2003); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998), vacated on other grounds *sub nom. Bd. of Regents of Univ. of N.M. v. Migneault*, 528 U.S. 1110 (2000); *Lafleur v. Tex. Dep't of Health*, 126 F.3d 758 (5th Cir. 1997) (*per curiam*); and *Zombro v. Baltimore*

City Police Dep't, 868 F.2d 1364 (4th Cir. 1989)). But district courts in other circuits are split, the court observed, Pet. App. 20a, and "[g]iven the conflicting case law, further review of the issue is required," Pet. App. 23a.

The court described the question as "admittedly a close call, especially in light of the conflicting decisions from our sister circuits." *Ibid.* Ultimately, however, the Seventh Circuit became the first federal appellate court to hold that the ADEA does not "preclude a § 1983 claim for constitutional rights." Pet. App. 23a & n.2. The court recognized that, in *Sea Clammers* and another decision, *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), this Court held that comprehensive remedial regimes in federal statutes—environmental laws in *Sea Clammers* and the Telecommunications Act in *Rancho Palos Verdes*—displaced a § 1983 remedy for the violation of those laws. Pet. App. 9a-10a. And the Seventh Circuit acknowledged that "the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights, akin to *Sea Clammers* and *Rancho Palos Verdes*." Pet. App. 23a. Furthermore, the court observed, this Court has displaced § 1983 claims brought by plaintiffs, like respondent, who seek to bypass a specific statutory remedy by raising a constitutional claim under § 1983. Pet. App. 10a-13a (citing, *e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Smith v. Robinson*, 468 U.S. 992 (1984), superceded by statute, PL 99-372, 100 Stat. 796 (1986)).

But the Seventh Circuit interpreted *Smith*, *Preiser*, and a third decision, *Fitzgerald v. Barnstable School*

Committee, 555 U.S. 246 (2009), to require something more than the established, *Sea Clammers* inquiry into the scope of a law's remedial regime when determining whether that law displaces a § 1983 remedy for the violation of a constitutional (rather than a statutory) right. Pet. App. 17a, 26a-28a. The Seventh Circuit read those decisions to direct courts to look for express statements of congressional intent in the statute's text and legislative history, and to compare the statute's protections to those available under the Constitution via § 1983. Pet. App. 26a-28a, 32a. The court also relied on the general principle that implied repeal of pre-existing claims is disfavored. Pet. App. 25a-26a. Here, despite the fact that the "ADEA's heightened scrutiny provides a stronger mechanism" than equal protection "for plaintiffs to challenge age discrimination in employment," Pet. App. 29a, because the ADEA lacks "legislative history or statutory language precluding constitutional claims," and because there are differences between the "rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim," the court permitted respondent to proceed on his equal protection count, Pet. App. 23a.

SUMMARY OF ARGUMENT

The Seventh Circuit's judgment should be reversed. Congress has enacted an exhaustive procedural and remedial regime for resolving federal age discrimination claims. The EEOC (and in some cases state regulators) must attempt to settle these claims informally whenever possible, and if litigation is unavoidable, the ADEA offers plaintiffs a detailed menu of legal and equitable remedies. At the same time, Congress has balanced competing interests and enacted special rules for resolving federal age claims by certain state and municipal employees. Thus, high-level policymakers and government attorneys may seek the ADEA's protections only through a specialized administrative procedure—a process commensurate with the unique sensitivities that arise when these officials seek federal relief against their public employers.

Respondent's rule—which the Seventh Circuit adopted in conflict with all other federal appellate courts to reach the question—would allow public employees to sidestep every element of this comprehensive regime. Far from abiding by special restrictions, as Congress intended, public-sector workers alone could ignore every one of the ADEA's requirements. Unlike their private-sector counterparts, state and local government employees could file suit without notifying the EEOC or state regulators, much less affording them the time the ADEA guarantees to pursue informal conflict resolution. And public employees alone could seek punitive damages for claimed age discrimination, a remedy that the ADEA disallows in favor of a capped, liquidated-damages

remedy. On top of all this, respondent's rule would permit high-level state and municipal employees to avoid the requirements that Congress created specifically for them.

Such a result is not only absurd in theory but would impose significant harms in practice, for while it is difficult to prevail ultimately on age discrimination claims under the Equal Protection Clause, these claims readily survive motions to dismiss, and they carry high discovery costs and the threat of punitive damages. Congress could not have intended to permit these claims to proceed, as the rule announced in *Sea Clammers* and *Smith* recognizes. This rule presumes that Congress meant to bar competing claims under § 1983 when these claims would upend a comprehensive federal regime targeting the same harm. The ADEA, with its exhaustive procedures and remedies, including special rules for certain state and local government employees, is precisely the type of statutory scheme that the *Sea Clammers/Smith* principle exists to protect. Accordingly, the ADEA's remedial regime displaces respondent's § 1983 equal protection age discrimination claim.

ARGUMENT

Until the Seventh Circuit's decision below, every federal appellate court to address the issue had properly held that the relief available under the ADEA displaces competing § 1983 equal protection remedies for age discrimination in state and local government employment. The controlling legal principle is well settled—when a federal statute creates a comprehensive remedial regime, Congress intends plaintiffs to use that regime, rather than § 1983, to seek relief for the same class of harms. Here, Congress has created an exhaustive regime for redressing age discrimination claims, including special rules for certain government employees. This easily demonstrates Congress' intent to displace competing remedies under § 1983. In the end, the Seventh Circuit erred by misreading this Court's decisions in *Smith* and *Fitzgerald* to announce a more rigorous test for displacing § 1983 claims involving constitutional rights, a test that lacks support in those cases and is out of step with other decisions of this Court.

I. A Statute That Creates A Comprehensive Remedial Regime Displaces Competing Claims Under § 1983.

While § 1983 generally provides a remedy for the violation of federal statutory or constitutional rights, see *Maine v. Thiboutot*, 448 U.S. 1, 4-5 (1980), this is not always so, see *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). "[T]here is only a rebuttable presumption that [a federal] right is enforceable under § 1983." *Blessing v. Freestone*, 520

U.S. 329, 341 (1997); see also *Rancho Palos Verdes*, 544 U.S. at 120. Congress may rebut that presumption and foreclose a § 1983 remedy in one of two ways, either (1) expressly on the face of a statute or in its legislative history or (2) impliedly by creating a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341; see also *Smith*, 468 U.S. at 1012 (relying on fact that legislative history did not affirmatively establish congressional intent to permit competing constitutional claim under § 1983).

1. This Court first announced the test for impliedly displacing § 1983 remedies in *Sea Clammers*. There, the Court held that the citizen-suit provisions in the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA) foreclosed the plaintiffs from proceeding under § 1983 for violations of the same laws. The Court explained that, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive," this alone "may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." 453 U.S. at 20. Accordingly, when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." *Ibid.* (internal quotation marks omitted).

It was thus dispositive that the statutes in *Sea Clammers* contained "unusually elaborate enforcement provisions," *id.* at 13, including authorizing the Administrator of the Environmental Protection Agency

to respond to violations of the FWPCA with compliance orders and lawsuits, see *id.* at 13-14. "[A]ny interested person" could also seek judicial review of various Administrator decisions. *Ibid.* And the FWPCA's express citizen-suit provision authorized claims for injunctive relief, while requiring citizens to comply with certain procedures before filing suit. See *id.* at 14. The MPRSA contained most of these same elements. See *ibid.*

"In view of these elaborate enforcement provisions," the Court held, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA." *Ibid.* Rather, without "strong indicia of a contrary congressional intent," the Court was "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. Indeed, it was "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions." *Id.* at 20. With such statutory remedies in place, the Court inferred that Congress "intended to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21.

2. The foregoing analysis is not limited to displacing competing § 1983 remedies for statutory violations. The Court relied on *Sea Clammers* and applied its test, without alteration, to displace competing § 1983 *constitutional* claims in *Smith*.

At issue in *Smith* was whether the remedial process set forth in the Education of the Handicapped Act

(EHA) supplanted a § 1983 equal protection claim for disability discrimination in the denial of educational opportunities. See 468 U.S. at 1008-1009. The EHA provided an "enforceable substantive right to a free appropriate public education" and "an elaborate procedural mechanism to protect the rights of" children with disabilities. *Id.* at 1010-1011. This mechanism advanced "Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed safeguards, and a right to judicial review." *Id.* at 1011.

Due to these comprehensive procedures and Congress' expressed intent to give local agencies primary responsibility for developing educational plans, this Court found "it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education." *Ibid.* Permitting such a claim under § 1983 would render most of the EHA's procedural protections "superfluous" and undo Congress' decision to have parents and local educators, rather than district courts, determine an appropriate educational plan. *Id.* at 1011-1012. Because "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme," the Court applied *Sea Clammers* to hold that the EHA displaced equal protection claims for a free appropriate public education. *Id.* at 1012-1013.

In fact, *Smith*'s application of the implied-displacement rule from *Sea Clammers* to constitutional

claims was presaged by this Court's 1973 decision in *Preiser*. There, plaintiff inmates sought to challenge the revocation of good-conduct credits, and the Court held that the plaintiffs may do so only under the federal habeas corpus statute; they could not sidestep that law by seeking relief under § 1983 for violations of their constitutional rights. See 411 U.S. at 488-490. The habeas statute required the plaintiffs to exhaust their state remedies before pursuing federal judicial relief, and the Court determined that it "would wholly frustrate explicit congressional intent to hold that the [plaintiffs there] could evade this requirement by the simple expedient of putting a different label on their pleadings." *Id.* at 489-490. Accordingly, because "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, * * * that specific determination must override the general terms of § 1983." *Id.* at 490. Thus, as *Sea Clammers* and *Smith* would later make express, a statute's comprehensive remedial regime alone suffices to demonstrate Congress' displacement of a competing § 1983 remedy for violation of a statutory or constitutional right.

3. The Court applied this same principle yet again in *Rancho Palos Verdes*, this time to reject the plaintiff's effort to obtain relief under § 1983 for violations of the Telecommunications Act of 1996 (TCA). Reiterating the rule from *Sea Clammers* and *Smith*, the Court emphasized not merely the comprehensive nature of the TCA's remedial scheme, but that statute's more limited remedies: the "provision of an express, private means

of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." 544 U.S. at 121. Because the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," the Court recognized that the "existence of a more restrictive private remedy" than is available generally under § 1983 "has been the dividing line" in Supreme Court case law in determining whether Congress impliedly displaced a § 1983 remedy. *Ibid.* (internal quotation marks omitted).

In short, the implied-displacement rule from *Sea Clammers* and *Smith* proceeds from the premise that "limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983." *Id.* at 124. It was therefore dispositive in *Rancho Palos Verdes* that the TCA allows only 30 days to file a petition to review a final governmental action, requires district courts to resolve these suits expeditiously, bars plaintiffs from recovering attorney's fees and costs, and may bar compensatory damages as well. See *id.* at 122-123. Section 1983 imposes none of these procedural requirements or remedial limits. See *id.* at 123.

The Court also made clear in *Rancho Palos Verdes* that the implied displacement of § 1983 claims does not "contravene the canon against implied repeal" (on which the Seventh mistakenly relied, see Pet. App. 25a-26a), for that canon does not apply to a statute, like § 1983, that creates no substantive rights but merely provides a cause of action to remedy the violation of an "'otherwise defined federal right.'" 544 U.S. at 120 n.2

(quoting *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 376 (1979)).

4. This Court most recently applied the *Sea Clammers/Smith* displacement analysis to determine whether Title IX of the Civil Rights Act supplants a § 1983 remedy under the Equal Protection Clause for gender discrimination in education. Once again, the Court stressed that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983," the Court has "placed primary emphasis on the nature and extent of that statute's remedial scheme." *Fitzgerald*, 555 U.S. at 253 (citing *Sea Clammers*, 453 U.S. at 20). Where the § 1983 claim is based on a statutory right, evidence that Congress intended to displace that remedy may be found in the text of the statute, or it may be implied from the creation of a comprehensive enforcement regime. See *id.* at 252. Where the § 1983 claim is based on a constitutional violation, the Court continued, courts also may ask whether "the contours of [the statutory and constitutional] rights and protections diverge in significant ways." *Id.* at 252-253.

Thus, *Fitzgerald* recognized, in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*, the statutes required plaintiffs to undertake particular procedures or exhaust administrative remedies before filing suit, and offering them a direct route to court via § 1983 "would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes." *Id.* at 254. Unlike the laws in those cases, the Court reasoned, Title IX does not even provide an

express private right of action; rather, that right was judicially implied. See *id.* at 255. In fact, by the statute's terms, the only way to penalize gender discrimination is through an administrative procedure to withdraw federal funding. See *ibid.* This procedure "stand[s] in stark contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue" in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*. *Ibid.* "[P]arallel and concurrent § 1983 claims [for gender discrimination] will neither circumvent required [Title IX] procedures nor allow access to new remedies." *Id.* at 255-256. Indeed, the Court "has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation." *Id.* at 256. Accordingly, *Fitzgerald* held that Title IX does not supplant a § 1983 remedy. See *ibid.*

Fitzgerald then went on to compare the substantive rights guaranteed under Title IX and the Equal Protection Clause, reasoning that this comparison "lends further support to the conclusion" the Court had reached previously in the opinion "that Congress did not intend Title IX to preclude § 1983 constitutional suits." *Ibid.* Moreover, the Court reasoned, Title IX's context and history show that the Congress that passed it "explicitly envisioned that private plaintiffs would bring constitutional claims to challenge gender discrimination," and "it must have recognized that plaintiffs would do so via [§ 1983]." *Id.* at 258. Finally, Title IX was modeled on Title VI with the express understanding that the former would be interpreted in

step with the latter, and courts had uniformly read Title VI to permit competing § 1983 claims. See *id.* at 258-259.

In short, the fact that Title IX provided no express, private right of action (and thus by definition no comprehensive regime to enforce that right) alone ensured that the plaintiffs' § 1983 equal protection claim would survive. See *id.* at 256. In contrast, as explained in Part II, the ADEA creates a private right of action and a detailed remedial regime more exhaustive than those found sufficient to displace § 1983 remedies in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*. As further explained, that regime includes special procedures for certain government employees that plaintiffs like respondent could sidestep entirely under his proposed rule.

II. The ADEA Creates A Comprehensive Remedial Regime That Displaces § 1983 Claims.

Congress has created an exhaustive remedial regime for age discrimination claims by private and public-sector employees. The regime includes an important role for the EEOC (and its state counterparts), whom Congress tasks with resolving age discrimination conflicts informally whenever possible, and the ADEA defines a spectrum of relief that plaintiffs may recover when litigation does ensue. Congress also focused on certain state and local government employees and created special rules for these officials commensurate with the unique problems that their age discrimination claims present. Permitting public employees to reframe

their age discrimination complaints as § 1983 equal protection claims would allow these employees to ignore this carefully drawn regime wholesale, precisely what the *Sea Clammers/Smith* rule exists to prevent. And failing to apply that rule here would have significant, adverse consequences, for while equal protection claims for alleged age discrimination are unlikely to succeed in the end, these claims readily survive motions to dismiss, and they carry high discovery costs and the threat of punitive damages for state and municipal employers.

A. The ADEA Establishes An Exhaustive Remedial Regime That Favors Informal Conflict Resolution And Gives The EEOC Substantial Control Over Federal Age Discrimination Claims.

As this Court has recognized, the ADEA establishes a comprehensive remedial regime for federal age discrimination claims. See, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 577-578 (1978) ("The enforcement scheme for the [ADEA] is complex—the product of considerable attention during the legislative debates preceding passage of the Act."). It "is a precisely drawn, detailed statute, similar to other statutory schemes which have been held to provide the exclusive judicial remedy for a stated abuse." *Zombro*, 868 F.2d at 1369. The regime advances Congress' preference for resolving these claims informally and vests considerable authority in the EEOC to investigate, cooperatively redress, and, if need be, litigate federal age claims.

1. Congress concluded that much of the arbitrary age discrimination in the American workplace was the

product of misinformation and ill-founded assumptions about the effect of age on occupational performance. See, *e.g.*, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004) (describing ADEA's legislative history, which showed "disadvantage to older individuals from arbitrary and stereotypical employment distinctions"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Congress' promulgation of the ADEA was prompted by its concerns that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

In line with this conclusion, the ADEA aims "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). And as this Court has recognized, the Act makes it a priority for the EEOC to resolve age-based workplace disputes informally and cooperatively whenever possible. See, *e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401 (2008) (describing "Congress' expressed desire that the EEOC act as an information provider and try to settle employment disputes through informal means"). Congress stressed "that the responsibility for enforcement vested in the Secretary [of Labor, now the EEOC] * * *, be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense." H.R. Rep. No. 805, at 5 (1967); see also S. Rep. No. 723, at 5 (1967) (describing Congress' intention that "formal methods be applied only if voluntary compliance cannot be achieved"). In this sense, "[t]he role of the EEOC is central to effectuating the policies of the [ADEA]," for

"[i]nformal conciliation pursued by the EEOC is the primary method of dispute resolution envisioned by the Act." *Frye v. Grandy*, 625 F. Supp. 1573, 1575 (D. Md. 1986).

2. The ADEA gives effect to its preference for informal conflict resolution and voluntary compliance by (1) requiring aggrieved employees to notify the EEOC promptly of claimed age discrimination, (2) directing the EEOC to resolve disputes informally, and (3) forbidding employees from filing suit for an initial period to allow the EEOC time to reach an informal, voluntary resolution before any litigation begins. Thus, before filing a federal age discrimination suit, an aggrieved employee must submit a claim to the EEOC, generally within 180 days of the alleged discrimination, see 29 U.S.C. § 626(d)(1)(A), at which point the EEOC "shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(d)(2); see 29 U.S.C. § 626(b); 29 C.F.R. § 1626.12; 29 C.F.R. § 1626.15(b); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (explaining that before filing suit on behalf of employee, EEOC must attempt to remedy discrimination "'through informal methods of conciliation, conference, and persuasion'") (quoting 29 U.S.C. § 626(b)); *Lorillard*, 434 U.S. at 580 (same).

To this end, the ADEA affords the EEOC an initial, uninterrupted period within which to contact the employer and resolve the dispute informally, before the start of any litigation. The Act forbids an aggrieved party from initiating an age discrimination suit for 60 days after filing his or her charge with the EEOC. See

29 U.S.C. § 626(d)(1); 29 C.F.R. § 1626.7(a); see also S. Rep. No. 723, at 5 (60-day notice provision exists "to allow time for the Secretary to mediate the grievance"); *id.* at 10 ("During the 60-day period, the Secretary must seek to eliminate unlawful practices by informal methods of conciliation."); H.R. Rep. No. 805, at 5, 10 (same, nearly verbatim). Meanwhile, EEOC regulations detail the way in which the Commission typically will initiate efforts at conciliation and the nature of "[a]ny agreement reached as a result of efforts" at informal conflict resolution. 29 C.F.R. § 1626.15(b), (c). Only upon notice of the "failure of such conciliation" may "the charging party or any person aggrieved by the subject matter of the charge * * * commence action to enforce their rights without waiting for the lapse of 60 days." 29 C.F.R. § 1626.12.

3. Congress gave state regulators a role in this initial, pre-litigation process as well. Plaintiffs in "deferral" States—those that offer an administrative remedy for age discrimination claims in employment—may not bring suit in federal court unless they have filed a discrimination charge with the appropriate state agency and either (1) 60 days have elapsed, or (2) that agency has terminated proceedings. See 29 U.S.C. § 633(b); see also *Oscar Meyer Co. v. Evans*, 441 U.S. 750, 754-755 (1979) (in deferral States, filing requirement is mandatory). This state exhaustion requirement "is intended * * * to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief." *Oscar Meyer*, 441 U.S. at

761; see also *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972) (Title VII's exhaustion rule "give[s] state agencies a prior opportunity to consider discrimination complaints"). Like the EEOC exhaustion requirement, this process encourages "conciliation efforts" and "may well facilitate rapid settlements," thus avoiding delay, which can be "particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Meyer*, 411 U.S. at 757 (quoting 113 Cong. Rec. 7076 (1967) (Sen. Javits)).[1]

4. The EEOC's role does not end with its (and state regulators') efforts at informal conflict resolution, however. The Commission also enjoys vast investigatory powers. See, *e.g.*, 29 C.F.R. § 1626.4 ("The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations."); see also 29 C.F.R. § 1626.15. And

---

[1] A deferral State may waive its right to this initial 60-day period. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 117 (1988) (plurality op.) (States "may, if they choose, waive the [Title VII] 60-day deferral period but retain jurisdiction over discrimination charges by entering into worksharing agreements with the EEOC"). The Seventh Circuit has held that Illinois' workshare agreement with the EEOC, which apportions initial jurisdiction over discrimination complaints between the Illinois Department of Human Resources and the EEOC, allows certain ADEA plaintiffs to file with the EEOC without first filing with the state agency. See, *e.g.*, *Kaimowitz v. Bd. of Trs. of the Univ. of Ill.*, 951 F.2d 765, 767 (7th Cir. 1992).

"[u]pon the failure of informal conciliation, conference and persuasion * * *, the Commission may initiate and conduct litigation." 29 C.F.R. § 1626.15(d). Indeed, the EEOC may pursue litigation against an employer even where an employee files a charge but later seeks to withdraw it, see 29 C.F.R. § 1626.13, or where the employee decides to waive his or her own right to file suit, see 29 U.S.C. § 626(f)(4).

Moreover, the EEOC's right to pursue litigation against an employer displaces the employee's own right to do so. See 29 U.S.C. § 626(c)(1) ("[T]he right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter."). If the EEOC dismisses a charge or if "the proceedings" on that charge "are otherwise terminated by the Commission," then the claimant may file his or her own suit under the Act. 29 U.S.C. § 626(e) (giving employee 90 days to file suit after receiving notice that EEOC has terminated proceedings); see also 29 C.F.R. §§ 1626.17, 1626.18(c).

5. Beyond its preference for informal conflict resolution and rules giving the EEOC (and state regulators) priority in litigation, the ADEA also details the relief available to aggrieved employees. Here, the Act imports remedies from the Fair Labor Standards Act (FLSA). See 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 211(b), parts of § 216, and § 217); *C.I.R. v. Schleier*, 515 U.S. 323, 325 (1995) ("The ADEA incorporates many of the enforcement and remedial mechanisms of the [FLSA]."). These FLSA sections allow employees to sue in federal or state court for compensatory damages, "employment, reinstatement,

promotion," "a reasonable attorney's fee to be paid by the defendant," "costs of the action," and injunctive relief otherwise prohibiting employers from violating the Act. 29 U.S.C. §§ 216(b), 217; see also 29 U.S.C. § 626(b). Like FLSA plaintiffs, moreover, victims of age discrimination may receive liquidated damages, though such damages are available under the ADEA "only in cases of willful violations," 29 U.S.C. § 626(b), and never in an amount that exceeds the compensatory award, see 29 U.S.C. § 216(b).

Courts have long recognized the FLSA for its "comprehensive remedial scheme," "as shown by the 'express provision for private enforcement in certain carefully defined circumstances.'" *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999) (quoting *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 93 (1981)). Indeed, the statute provides such a "very detailed and carefully defined right of action" that "a clearer case of implied intent to exclude other alternative remedies by the provision of one would be difficult to conceive." *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027, 1028 (N.D. Cal. 1972); see also *Kendall v. City of Chesapeake*, 174 F.3d 437, 443-444 (4th Cir. 1999) ("Like the statutes at issue in *Sea Clammers* * * *, the FLSA provides an 'unusually elaborate' enforcement scheme.").

Accordingly, courts have held that the FLSA's exhaustive regime displaces other, competing causes of action—including a contract action to recover for violations of the rights provided by the statute, see *Lerwill*, 343 F. Supp. at 1028; state law contract, negligence, and fraud claims for failure to pay overtime,

see *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007); employer claims to contribution or indemnification, see *Herman*, 172 F.3d at 143-144; parallel state law claims, see *Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 76 (1st Cir. 1998); opt-out class actions to vindicate FLSA rights, see *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 257-258 (3rd Cir. 2012); a RICO claim for violations of wage and hour laws, see *Gordon v. Kaleida Health*, 847 F. Supp. 2d 479, 489-490 (W.D.N.Y. 2012); and, applying *Sea Clammers* and *Smith*, claims under § 1983 for violations of the FLSA itself, see *Kendall*, 174 F.3d at 443-444; *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 905 (M.D. Tenn. 2009).

"Thus, not only is the ADEA's remedial scheme itself comprehensive, but it gains added comprehensiveness through inclusion of elaborate and extensive procedures under the FLSA," a statute courts have recognized for its own exhaustive remedial scheme. David C. Miller, *Alone in its Field: Judicial Trend to Hold that the ADEA Preempts § 1983 in Age Discrimination in Employment Claims*, 29 Stetson L. Rev. 573, 586 (2000).

B. Congress Added Still More To The ADEA's Remedial Regime By Focusing On The Proper Scope And Form Of Federal Age Discrimination Claims Available To Public Employees.

Not only does the ADEA establish an exhaustive remedial scheme, with a strong preference for informal conflict resolution, but Congress has focused particular

attention on the proper scope of federal age discrimination claims available to public employees, specifically. Initially, Congress determined that certain high-level government policymakers should not be permitted to bring federal age discrimination claims at all, out of concern that such lawsuits would involve federal courts and regulators in the most sensitive quarters of state and municipal government. Later, and even after this Court's decisions in *Sea Clammers* and *Smith* made clear that comprehensive federal statutes displace competing § 1983 claims for constitutional violations, Congress created a specialized, administrative remedy for these once-excluded, high-level government employees.

1. Congress extended the ADEA's protections to federal, state, and municipal employees for the first time in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 74 (amending 29 U.S.C. § 630). In doing so, however, Congress withheld these protections from certain high-level policymakers and government attorneys. The ADEA thus "exempt[s]" from the definition of "employee" "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office," provided the worker in question is not "subject to the civil service laws of a State government, governmental agency, or political subdivision." 29 U.S.C. § 630(f).

Congress borrowed this language from a Title VII exemption enacted two years earlier, when Congress extended that law to public employees. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. § 2000e). Congress recognized that "officers who participate directly in the formulation, execution or review of broad public policy perform functions that go to the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (internal quotation marks omitted). Legislators thus intended these exceptions to give elected officials "complete freedom" to decide who will "develop[] policies that will implement the overall goals of the elected officials." EEOC Dec. No. 79-8, EEOC Dec. P 6739, 1978 WL 5829 (EEOC Oct. 20, 1978); accord EEOC Dec. No. 78-42, EEOC Dec. P 6725, 1978 WL 5794 (EEOC Sept. 29, 1978).[2] "In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best." EEOC Dec. No. 79-8, EEOC Dec. P 6739, 1978 WL 5829 (EEOC Oct. 20, 1978).

By extending the ADEA to public employees, while withholding federal age claims from a small subset of the most high-level officials, Congress thus struck "a

---

[2] Because this provision in the ADEA has little legislative history, courts look to the history of Title VII's identical provision when interpreting it. See, *e.g.*, *Butler v. N.Y. State Dep't of Law*, 211 F.3d 739, 747 (2d Cir. 2000); *EEOC v. Massachusetts*, 858 F.2d 52, 55 (1st Cir. 1988).

delicate balance between the protection of employees from age discrimination," on the one hand, "and the protection of a state's—and its people's—ability to independently govern itself," on the other. *EEOC v. Massachusetts*, 858 F.2d 52, 57 (1st Cir. 1988). See generally *Gregory*, 501 U.S. at 464-465 (discussing 29 U.S.C. § 630(f)). Congress struck a similar balance—on a temporary basis in 1986 and then permanently in 1996, see *Correa-Ruiz v. Fortuno*, 573 F.3d 1, 5 (1st Cir. 2009)—in narrowing the circumstances under which firefighters and peace officers may seek redress under the Act, see 29 U.S.C. § 623(j).

2. Congress turned its attention again to the proper scope of federal age claims for public employees in 1991, this time to create a specialized administrative process for those high-level policymakers and government attorneys—except elected officials themselves—that the ADEA had excluded from its scope in 1974. The Government Employee Rights Act of 1991 ("GERA"), 42 U.S.C. §§ 2000e-16a through 2000e-16c, makes the ADEA's remedial regime still more comprehensive by "extend[ing] protections against discrimination based on * * * age * * * to [these] previously exempt high-level state employees." *Bd. of Cnty. Commr's v. EEOC*, 405 F.3d 840, 844 (10th Cir. 2005).

GERA entitles these employees to such remedies as are available under the ADEA. See 42 U.S.C. § 2000e-16b(b)(2). But GERA's "special procedures and limited remedies" are "unlike those for other complainants." 1 Mark A. Rothstein, *et al.*, *Employment Law* § 2.5, at 120 (3d ed. 2004). Unlike ADEA plaintiffs, an aggrieved employee proceeding under GERA must

obtain an administrative determination from the EEOC before seeking judicial relief, and then must appeal to the federal circuit courts, where Congress has sharply curtailed the scope of judicial review.

Specifically, the employee must file a discrimination complaint with the EEOC within 180 days of the alleged ADEA violation. See 42 U.S.C. § 2000e-16c(b)(1); 29 C.F.R. § 1603.102(a). (Alternatively, if an age discrimination claim by a state or local official falls within the jurisdiction of a qualified state or local agency, that agency has an initial 60 days to process the complaint if it wishes to do so. See 42 U.S.C. § 2000e-16c(b)(2); 29 C.F.R. § 1603.103(a).) Once a complaint is properly before the EEOC, the Commission then must determine whether a violation has occurred and, if so, provide for appropriate relief in a final order, consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554-557. See 42 U.S.C. § 2000e-16c(b)(1).

This process generally begins with a hearing before an administrative law judge, see 29 C.F.R. §§ 1603.201-1603.217, who (absent "good cause") must issue a decision on the merits within 270 days of receiving the complaint for a hearing, see 29 C.F.R. § 1603.217(a). From the ALJ's decision, one may appeal to the Commission itself, see 29 C.F.R. §§ 1603.301-1603.304, and from there, judicial review is available in the federal courts of appeals, see 42 U.S.C. § 2000e-16c(c). Judicial review is sharply circumscribed, however. See 42 U.S.C. § 2000e-16c(d). A final EEOC determination is subject to reversal only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures;

or (3) unsupported by substantial evidence." *Ibid.*; see also *Marion Cnty. Coroner's Office v. EEOC*, 612 F.3d 924, 929 (7th Cir. 2010) (describing standards for judicial review of EEOC order under GERA); *Dyer v. Radcliffe*, 169 F. Supp. 2d 770, 775 (S.D. Ohio 2001) (describing GERA's "more limited form of judicial review").

But GERA is significant not only for the comprehensiveness it adds to the age discrimination regime and its focus on the proper scope of claims by high-level public employees. The legal context surrounding its enactment is significant in its own right. By GERA's enactment in 1991, this Court had decided *Sea Clammers* and had extended the rule announced in that case to constitutional claims in *Smith*. See *supra* pp. 12-14. And the Fourth Circuit, the only federal appeals court to have reached the issue, had applied *Sea Clammers* and *Smith* to hold that the ADEA displaces equal protection claims for age discrimination in state employment. See *Zombro*, 868 F.2d at 1366-1371.

In fact, by the time Congress enacted GERA, legislators had twice failed to overturn *Smith*'s principles for displacing constitutional claims under § 1983. GERA originated as an amendment to what became the Civil Rights Act of 1991 after two other attempts at civil rights reform failed in 1990 and early 1991. See S. Amend. 1287 to S. 1745, 102d Cong. (1991) (amendment of Sen. Grassley). The bills' proponents feared that comprehensive civil rights legislation would lead courts to find implied limitations on the reach of earlier civil rights laws, and these legislators cited

Smith as a source of their concern. See, *e.g.*, H.R. Rep. No. 102-40, pt. 1, at 87-89 (1991); H.R. Rep. No. 102-40, pt. 2, at 34-35 & nn. 62, 65 (1991). The two unenacted bills' supporters in Congress thus would have codified certain "Rules of Construction for Civil Rights Laws," which included language directing courts to construe all civil rights laws "broadly"; forbidding repeal or amendment of civil rights laws "by implication"; and dictating that "courts and administrative agencies shall not rely on the amendments made by the [Act] as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act." H.R. 1, 102d Cong. § 109 (1991) (as passed by House, June 5, 1991); S. 2104, 101st Cong. § 11 (1990) (as vetoed by President, Oct. 22, 1990).

But these proposals never became law; *Smith* (and *Zombro*) remained in place. See generally *Watson v. U.S.*, 552 U.S. 74, 82-83 (2007) (because "Congress remains free to alter what [this Court] ha[s] done," Congress' failure to modify prior interpretation of statute demonstrates "congressional acquiescence" in that interpretation) (internal quotation marks omitted). And after these failed efforts to overturn portions of *Smith* put legislators on notice that making the ADEA's remedial regime more comprehensive would itself ensure the displacement of equal protection claims under § 1983, they nevertheless chose to confer ADEA rights on the previously excluded class of policymakers, with significant procedural limitations. See *McQuiggin v. Perkins*, No. 12-126, slip op. 14 n.3 (U.S. 2013)

("Congress legislates against the backdrop of existing law.").

C. Section 1983 Claims For Age Discrimination Would Allow Plaintiffs To Circumvent Congress' Comprehensive Remedial Regime, At Substantial Cost To Public Employers.

The doctrine announced in *Sea Clammers* and *Smith* exists to prevent plaintiffs from using § 1983 to sidestep a comprehensive remedial regime. See *supra* Part I. That doctrine compels the displacement of § 1983 equal protection claims for age discrimination in state and municipal employment. As shown above, the ADEA creates an exhaustive remedial regime, which Congress crafted with particular focus on the proper scope of federal age claims for public employees. It is inconceivable that Congress intended to allow plaintiffs to ignore that regime entirely "by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-490. This becomes especially clear when one considers that § 1983 equal protection claims offer plaintiffs little likelihood of ultimate success, while they impose substantial costs on public employers.

1. Section 1983 Equal Protection Claims For Age Discrimination Would Circumvent Congress' Carefully Constructed Remedial Regime.

As many courts have recognized, allowing state and municipal employees to pursue age claims under § 1983 invites them to evade the ADEA's carefully constructed remedial regime in obvious ways. Parties would have

"direct and immediate access to the federal courts, [the Act's] comprehensive administrative process would be bypassed, and the goal of compliance through mediation would be discarded." *Zombro*, 868 F.2d at 1366; see *id.* at 1367 ("[I]f * * * § 1983 is available to the ADEA litigant, the congressional scheme behind ADEA enforcement could easily be undermined if not destroyed."); *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1448 (5th Cir. 1992) ("By establishing the ADEA's comprehensive scheme for the resolution of employee complaints of age discrimination, Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA.") (internal quotation marks omitted).

1. If the ADEA did not preclude § 1983 constitutional claims, "[a]n impatient plaintiff might unilaterally dispense with the informal negotiations contemplated by Congress," "needlessly casting all concerned into costly litigation." *Britt*, 978 F.2d at 1449 (internal quotation marks omitted). This is precisely what the ADEA set out to avoid. Plaintiffs could bypass the EEOC entirely, notwithstanding its pivotal role under the Act. See *Frye*, 625 F. Supp. at 1575 ("The role of the EEOC is central to effectuating the policies of the" ADEA.). Likewise, although Congress sought to give state regulators an independent role in processing age claims, respondent's rule would permit public employees to bypass these regulators, too. And if a plaintiff sought to bring both an ADEA and an equal protection claim, the ability to proceed immediately in court on a § 1983 complaint would be sure to undermine

regulators' efforts at an informal, voluntary resolution of the ADEA claim.

Thus, just as permitting a § 1983 equal protection claim in *Smith* would have "render[ed] superfluous most of the detailed procedural protections outlined in the [EHA]" and "run counter to Congress' view that the needs of handicapped children are best accommodated" in a particular way—by having parents and the local education agency work together to formulate an individualized plan for each handicapped child's education," 468 U.S. at 1011-1012—permitting constitutional claims for alleged age discrimination in public employment would disregard Congress' strong preference for the informal resolution of age discrimination claims in the workplace. And just as permitting plaintiffs to seek relief under § 1983 would have ignored the "elaborate enforcement provisions" of the MPRSA and FWPCA, *Sea Clammers*, 453 U.S. at 14-15—which included a role for both federal regulators and private plaintiffs, see *id.* at 13-14—§ 1983 equal protection claims would sidestep the ADEA's even more detailed scheme and analogous division of labor between regulators and aggrieved employees. Here, as in *Sea Clammers*, without "strong indicia of a contrary congressional intent," courts should presume that "Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

2. And for the high-level policymakers and government attorneys who now receive ADEA protections by operation of GERA, claims under § 1983 would avoid the regime Congress created for these officials. Worse still, employees could seek to proceed at

once administratively under GERA and in court on an equal protection claim. Section 1983 suits, which "involve plenary judicial evaluation of asserted rights deprivations," "differ considerably" from the "deferential consideration of matters within an agency's expertise" that GERA anticipates. *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, *J.*, concurring). Allowing high-level employees to proceed under § 1983 would "undermine the compromise"—between protecting workers and preserving the effective functioning of government—"that the [ADEA] reflects." *Id.* at 128-129 (same). See generally *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (recognizing that Congress is best positioned to strike proper balance between "governmental efficiency," on the one hand, and "the rights of employees," on the other).

This case illustrates the point. While respondent insists that he is an "employee" within the meaning of the ADEA, the district court has held that respondent is instead an "appointee to a policymaking level," Pet App. 68a, meaning he may pursue his ADEA remedies only under GERA's specialized administrative process. Respondent's proposed rule, however, would allow him to avoid these requirements, "by the simple expedient of putting a different label on [his] pleadings." *Preiser*, 411 U.S. at 489-490.

3. Finally, in addition to its procedural rules, the ADEA "limits relief in ways that § 1983 does not." *Rancho Palos Verdes*, 544 U.S. 113 at 122. Again, in lieu of the punitive damages available under § 1983, see *Smith v. Wade*, 461 U.S. 30, 35-36, 51, 56 (1983), the ADEA permits only limited, liquidated damages, see 29

U.S.C. § 626(b); 29 U.S.C. § 216(b) (incorporated by reference into § 626(b)); see also *Ahlmeyer*, 555 F.3d at 1059. As in *Rancho Palos Verdes*, the presence here "of a more restrictive private remedy" alone establishes Congress' intent to displace a competing § 1983 cause of action, for "limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983." 544 U.S. at 121, 124.

2. The Equal Protection Clause Offers Little Likelihood Of Success On Age Discrimination Claims, But These Easily Pled Claims Impose Substantial Costs On Public Employers.

The costs of allowing plaintiffs to sidestep ADEA remedies and proceed directly under the Equal Protection Clause are significant, and when compared with the low likelihood of success on those claims, it becomes even more obvious that Congress did not intend to leave competing § 1983 claims intact. On the contrary, it is far more reasonable to conclude that in creating its own comprehensive remedy and more robust substantive rights, the ADEA displaces § 1983 claims that can be very costly to litigate while offering the plaintiff little chance of ultimate success.

1. This Court has never sustained an equal protection claim for age discrimination in public employment. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) ("We have considered claims of unconstitutional age discrimination under the Equal Protection Clause three times," and "[i]n all three cases * * * held that the age classifications at issue did not

violate the * * * Clause."). This is not surprising, given the deference afforded the government in its role as employer. This Court has recognized "[t]ime and again * * * that the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 757-758 (2011) (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008)). "[G]overnment offices could not function if every employment decision became a constitutional matter,'" *Engquist*, 553 U.S. at 599 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)), and such "realities of the employment context" limit the constitutional rights of public employees, *id.* at 600; see also *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2497 (2011) ("The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected."); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").

Public employees' equal protection rights are circumscribed by "'[t]he government's interest in achieving its goals as effectively and efficiently as possible.'" *Engquist*, 553 U.S. at 598-599 (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality op.)). And equal protection claims for alleged age discrimination, like respondent's here, are particularly limited by the "relaxed" standard against which they are judged. *Mass. Bd. of Retirement v. Murgia*, 427 U.S.

307, 314 (1976) (*per curiam*). Age classifications survive constitutional scrutiny so long as they are not "so unrelated to the achievement of any combination of legitimate purposes" that a court "can only conclude" they are "irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); see also *Kimel*, 528 U.S. at 84 ("because an age classification is presumptively rational," plaintiff must "prov[e] that the facts on which the classification is apparently based could not reasonably be conceived to be true") (internal quotation marks omitted).

Consistent with the Equal Protection Clause, "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." *Kimel*, 528 U.S. at 83-84. The public employer may assume, for example, that advancing age brings increased susceptibility to physical and mental difficulties, although such "broad generalizations" may be "imperfect" and "probably not true * * * in the majority of cases." *Id.* at 84-86 (internal quotation marks omitted). Thus, public employers may terminate employees who reach a certain, predetermined age to avoid "tedious and often perplexing decisions" about whether they are still "physically and mentally qualified" for a job, *Gregory*, 501 U.S. at 471-472 (internal quotation marks omitted), as a part of "personnel policies * * * designed to create predictable promotion opportunities and thus spur morale" among younger workers, *Vance*, 440 U.S. at 98, and to "assure[] predictability and ease in establishing and administering" pension plans, *Gregory*, 501 U.S. at 471.

2. Notwithstanding these impediments to ultimate success, age-based equal protection claims threaten significant costs for government employers. Liberal pleading standards mean that, regardless of ultimate merit, well-pleaded complaints of employment discrimination generally will survive a motion to dismiss. This is because allegations that "a decisionmaker[] undert[ook] a course of action because of, and not merely in spite of, [the action's] adverse effects upon an identifiable group," *Ashcroft v. Iqbal*, 556 U.S. 662, 676-677 (2009) (internal quotation marks omitted, third alteration in original), provide "fair notice of what [the plaintiff's] claims are and the grounds upon which they rest" and thus state a claim for employment discrimination, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).[3] Such complaints will survive dismissal even if it "'appear[s] on the face of the pleadings that a recovery is very remote and unlikely.'" *Id.* at 515 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); see also *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (citing *Swierkiewicz* with approval); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-570 (2007)

---

[3] *Swierkiewicz* addressed the pleading standard for employment discrimination claims under the ADEA. The prevailing rule among those lower courts that recognize constitutional age discrimination claims is that these claims are "analyzed under the same standards as a claim made pursuant to the ADEA." *Shapiro v. N.Y. City Dep't of Educ.*, 561 F. Supp. 2d 413, 422 n.2 (S.D.N.Y. 2008); see also IMLA Amicus Br. in Supp. of Cert. 11-12 (collecting cases). The district court followed this approach here. See Pet. App. 117a.

(reaffirming *Swierkiewicz*'s pleading standard). Thus, the district court in this case required respondent to plead merely "that he suffered an adverse employment action on the basis of his * * * age." Pet. App. 117a.

This generous pleading standard "relies on liberal discovery rules and summary judgment motions * * * to dispose of unmeritorious claims," *Swierkiewicz*, 534 U.S. at 512, but discovery is by far the most costly aspect of modern civil litigation, accounting for up to 90 percent of litigation costs, see *Twombly*, 550 U.S. at 559; *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 268 (2004) (Breyer, *J.*, dissenting). Thus, "[t]he practical problem with allowing [constitutional age discrimination] claims to go forward in th[e public employment] context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place." *Engquist*, 553 U.S. at 608. Moreover, because discovery costs may approach or exceed the potential damages recovery—and when the threat of punitive damages is added to the mix—public employers are pressured to settle claims that would be unlikely to succeed at trial. See *Delta Airlines, Inc. v. August*, 450 U.S. 346, 363 n.1 (1981) (Powell, *J.*, concurring in the judgment) (observing, in employment discrimination case, that "the cost of litigation in this country * * * has reached the point where many persons and entities simply cannot afford to litigate even the most meritorious claim or defense").

Further, in cases where the plaintiff is a high-ranking government official, additional costs are at stake. GERA requires these employees to try their cases

on a relatively expedited basis before an ALJ, with deferential review on appeal. See *supra* pp. 31-32. But under the Seventh Circuit's rule, plaintiffs who recast their claims in terms of equal protection may instead proceed before a jury in federal district court, subject to more sweeping appellate review. See *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (noting "'cost and inconvenience and distractions of a trial upon a conclusion of the pleader, * * * [and] the hazard of a judgment against [public officials] based upon a jury's speculation as to motives'"); see also *Iqbal*, 556 U.S. at 685 (litigation's "heavy costs in terms of efficiency and expenditure of valuable time and resources * * * are only magnified" when defendants are senior government officials).

This case brings these costs into sharp relief. Respondent deposed the previous Illinois Attorney General and the current Attorney General's closest advisors, including her Chief of Staff and Chief Deputy Attorney General, and he sought and received interrogatory answers from the Attorney General herself and voluminous written discovery on high-level personnel decisions and other sensitive issues. Doc. 183-2. Furthermore, because the lawsuit places the adequacy of respondent's job performance at issue, petitioners were required to detail facts relating to specific litigation and strategy decisions made by the State's chief legal officer. Petitioners thus developed a factual record concerning the preparation of a lawsuit against a home repair contractor, Pet. App. 47a, 50a, the Office's interaction with other States in multi-State litigation and disagreements among those offices, Pet.

App. 49a-50a, and the handling of a multi-State settlement, Pet. App. 50a. If public officials are "to devote time to [their] duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation," especially where, as here, the underlying constitutional protections are so limited. *Iqbal*, 556 U.S. at 685.

Congress could not have intended this result. It is far more reasonable to presume Congress anticipated that the ADEA, which offers workers more robust substantive rights and an exhaustive remedial regime, would displace costly, generally unsuccessful litigation under § 1983.

* * *

In short, the ADEA creates a comprehensive remedial regime in its own right and by importing FLSA remedies. Congress made informal conflict resolution a priority and devoted substantial attention to the proper scope and limits of federal age claims available to public employees. Permitting these employees to recast their age discrimination claims under § 1983 and the Equal Protection Clause will undercut this regime. Section 1983 equal protection claims for age discrimination have little likelihood of ultimate success, but they are easy to plead, require often burdensome discovery, and carry the threat of punitive damages. These are precisely the circumstances under which *Sea Clammers* and *Smith* presume that Congress intended to displace competing claims under § 1983.

Indeed, it is no surprise that in *Kimel*, when this Court listed the alternative legal avenues open to state employees—who may not recover damages in federal court under the ADEA by operation of the Eleventh Amendment—the Court made no mention of a damages remedy under § 1983, even though the respondents raised that option in their brief. Compare Brief for Respondents, *Kimel*, 1999 WL 631661, at *38 (listing equal protection claims among a state employee's remedial options), with *Kimel*, 528 U.S. at 91-92 (recognizing only that these "employees are [still] protected by state age discrimination statutes"). Under this Court's well-established test, the ADEA displaces those claims.

III. The Seventh Circuit Misread This Court's Decisions In *Fitzgerald* and *Smith*.

Sea Clammers holds that, when Congress enacts a statute with a comprehensive remedial scheme, this alone demonstrates Congress' "intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20; see also *supra* p. 12. And the Seventh Circuit recognized that the ADEA qualifies as a comprehensive remedial scheme. See Pet. App. 25a ("agree[ing] with *Zombro* majority that" ADEA's remedial scheme is "comprehensive"); Pet. App. 28a (acknowledging that "the ADEA sets forth a rather comprehensive remedial scheme"). Rather than apply settled law to displace respondent's § 1983 claim here, however, the Seventh Circuit announced a new rule: "[W]e believe more is required than a comprehensive statutory scheme" to displace a § 1983 remedy for violation of a constitutional (rather than a statutory) right. Pet. App. 27a.

Specifically, under the rule announced below, "the language of the statute or the legislative history" must include "clear or manifest" statements of congressional intent to displace § 1983 claims, or there must be significant (if not perfect) overlap between "the rights and protections afforded by the statute and the Constitution." Pet. App. 32a. The Seventh Circuit purported to derive this novel approach from this Court's decisions in *Smith* and *Fitzgerald*, see Pet. App. 27a, 32a, but this overreads both cases.

1. As explained, see *supra* pp. 12, 14, *Smith* did not require Congress to state its intent to displace constitutional claims on the face of the statute or in its legislative history; the existence of "a carefully tailored [remedial] scheme," and the *absence* of evidence in the legislative history that Congress meant to allow plaintiffs to circumvent that scheme, established Congress' intent to preclude equal protection claims, 468 U.S. at 1012. Indeed, even the Seventh Circuit recognized that its new rule—requiring "clear and manifest" statements of Congress' preclusive intent in the statutory text or legislative history—was an expansion of *Smith*, noting that *Smith* merely "support[ed]" the court's "notion" that more than a comprehensive remedial scheme is required to displace constitutional claims. Pet. App. 27a.

2. Nor does "*Fitzgerald* direct[] [courts] to compare the rights and protections afforded by the statute and the Constitution," as the Seventh Circuit held. Pet. App. 32a. Again, *Fitzgerald*'s discussion on this point merely provided "further support" for the Court's conclusion that Title IX, which includes no express

private right of action, cannot implicitly displace competing constitutional claims. See *supra* p. 18; 555 U.S. at 256 ("A comparison of the substantive rights and protections * * * *lends further support* to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional claims.") (emphasis added). And Title IX leaves many victims of gender discrimination without any statutory remedy at all—it exempts elementary and secondary schools from its prohibition on discrimination in admissions, and it exempts military service schools and traditionally same-sex institutions from its coverage entirely. See *id.* at 257. The ADEA, in contrast, "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional." *Kimel*, 528 U.S. at 86.

Moreover, *Fitzgerald* involved alleged gender discrimination, which triggers heightened scrutiny under the Fourteenth Amendment. See *Kimel*, 528 U.S. at 84. The purported age-based discrimination at issue here, by contrast, is "unlike governmental conduct based on race or gender," *id.* at 83, and, as explained, is subject to a rational basis standard that makes it nearly impossible for plaintiffs to succeed at trial, see *supra* pp. 38-40. Given the rigorous scrutiny to which race and gender claims are subject, it would be reasonable to expect an "indication of congressional intent" beyond a comprehensive remedial scheme, Pet. App. 28a, to displace claims of unconstitutional race or gender discrimination. But nothing in *Fitzgerald* purports to overturn the rule in *Smith* that a statute's comprehensive remedial regime is alone grounds to

displace a competing § 1983 remedy for alleged discrimination against members of a non-suspect class, whose claims proceed under rational basis review.

3.a. The remaining ways in which the Seventh Circuit relied on *Fitzgerald* also fail. First, contrary to the decision below, see Pet. App. 33a, the fact that the ADEA exempts or places limits on claims for two narrow categories of public workers due to the nature of their jobs does not disfavor preclusion. See 29 U.S.C. § 630(f) (exempting elected officials, their personal staff, their policymaking appointees, and their legal advisors); 29 U.S.C. § 623(j) (limiting cause of action for law enforcement officers and firefighters). In fact, by operation of GERA, the high-ranking appointees to whom the Seventh Circuit refers do receive ADEA protections. Congress simply concluded that, given their high station and the nature of their work, these officials must pursue their ADEA rights through a specially designed, administrative process.

Moreover, by limiting claims by state police and firefighters, 29 U.S.C. § 623(j), Congress made the considered judgment that the benefits in affording these individuals unrestricted federal age discrimination claims (in addition to their state-law rights) are outweighed by the substantial disruption to States' ability to protect the public health and safety that would result if such claims were unqualified. And it would be especially difficult for police or firefighters to succeed on age-based constitutional claims in any event, given the nature of their duties. See *Murgia*, 427 U.S. at 314-315 (rejecting equal protection challenge to mandatory retirement age for police, recognizing that "the

legislature seeks to protect the public by assuring physical preparedness of its uniform police," and "physical ability generally declines with age"). Far from disfavoring preclusion, therefore, this limitation aimed at a narrow class of public employees, and the process that GERA creates for certain high-ranking officials, constitute further evidence that Congress intended to limit the field of age discrimination claims to what is covered by the ADEA.

b. Nor does this Court's holding in *Kimel*—that the ADEA does not validly abrogate the State's Eleventh Amendment immunity—somehow disfavor preclusion, as the Seventh Circuit concluded. See Pet. App. 34a.[4] The ADEA makes "unmistakably clear" Congress' intent "to subject the States to suit for money damages at the hands of individual employees." 528 U.S. at 74 (internal quotation marks omitted). This is further evidence that Congress anticipated that the ADEA—by subjecting the States to suits for money damages—would comprehensively regulate the field of age discrimination in employment.

To be sure, *Kimel* also holds that Congress did not successfully accomplish its goal of abrogating state sovereign immunity. See *id.* at 82-90. But Congress' intent to do so is what matters for purposes of assessing whether it intended to displace § 1983 actions. And although *Kimel* left the door open for Congress to "identif[y] any pattern of [unconstitutional] age

---

[4] Illinois has waived its Eleventh Amendment immunity from suit under the ADEA. See 745 ILCS 5/1.5(a) (2010).

discrimination by the States" to support its intended abrogation, *id.* at 89, Congress never did so. Insofar as state employers were concerned, therefore, Congress was content to safeguard their workers from age discrimination through the EEOC's (and state regulators') efforts at informal conflict resolution; federal suits by the EEOC, which may include claims for victim-specific damages[5]; and suits pursuant to state fair employment practice laws.[6] See *Engquist*, 553 U.S. at 609 ("Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains[.]").

Moreover, even if the "practical" effects of *Kimel*—that "state employees suing under the ADEA are left without a damages remedy," Pet. App. 34a—were relevant to the preclusion analysis, these effects also would favor preclusion. Like the Seventh Circuit's related concern that the ADEA limits who plaintiffs may sue, see Pet. App. 33a—which translates at best into a potential difference in remedies—such "limitations upon the remedy contained in [a] statute

---

[5] See *EEOC v. Bd. of Regents of the Univ. of Wis.*, 288 F.3d 296, 299-301 (7th Cir. 2002) (Eleventh Amendment does not bar EEOC from bringing ADEA claims against States on behalf of employees).

[6] *Kimel*, 528 U.S. at 92 n.* (collecting state statutes prohibiting age discrimination in public employment); *Borough of Duryea*, 131 S. Ct. at 2497 ("Employees who sue under * * * state employment laws often benefit from generous and quite detailed * * * provisions.").

are deliberate and are not to be evaded through § 1983," *Rancho Palos Verdes*, 544 U.S. at 121, 124; see *supra* pp. 15-16. Indeed, the Seventh Circuit's reasoning is irreconcilable with *Bush v. Lucas*. There, Congress' civil-service review process precluded a *Bivens* action by a federal employee complaining that his demotion violated the First Amendment. This was so even though, unlike under *Bivens*, the review process neither allowed the plaintiff to sue his supervisor individually nor offered "complete relief." 462 U.S. at 372, 388-390. Accordingly, contrary to the decision below, the fact that state employees may obtain less comprehensive remedies under the ADEA than they could in a § 1983 suit (or that they may be required to proceed against different defendants) counsels for preclusion, not against it.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
CLIFFORD W. BERLOW
MATTHEW P. BECKER
Ass't Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

JUNE 2013

Appendix A

Equal Protection Clause

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Appendix B

42 U.S.C. § 1983

Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983.

Appendix C

Age Discrimination in Employment Act

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the

impact of age on employment.

29 U.S.C. § 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on

reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire

any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of

participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section..

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the

requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(10) Special rules relating to age

(A) Comparison to similarly situated younger individual

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) Similarly situated

For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) Disregard of subsidized early retirement benefits

In determining the accrued benefit as of any date for purposes of this clause, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) Accrued benefit

For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) Applicable defined benefit plans

(i) Interest credits

(I) In general

An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a

rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return.

(II) Preservation of capital

An interest credit (or an equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) Market rate of return

The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I). In the case of a governmental plan (as defined in the first sentence of section 414(d) of Title 26, a rate of return or a method of crediting interest established pursuant to any provision of Federal, State, or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return for purposes of subclause (I) and a permissible method of crediting interest for purposes of meeting the requirements of subclause (I), except that this sentence

shall only apply to a rate of return or method of crediting interest if such rate or method does not violate any other requirement of this chapter.

(ii) Special rule for plan conversions

If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) Rate of benefit accrual

Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of—

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) Special rules for early retirement subsidies

For purposes of clause (iii)(I), the plan shall credit the accumulation account or similar amount with the amount of any early retirement benefit or retirement-

type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

(v) Applicable plan amendment

For purposes of this subparagraph—

(I) In general

The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) Special rule for coordinated benefits

If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) Multiple amendments

The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph through the use of 2 or more plan amendments rather than a single amendment.

(IV) Applicable defined benefit plan

For purposes of this subparagraph, the term "applicable

defined benefit plan" has the meaning given such term by section 1053(f)(3) of this title.

(vi) Termination requirements

An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan—

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) Certain offsets permitted

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides offsets against benefits under the plan to the extent such offsets are allowable in applying the requirements of section 401(a) of Title 26.

(D) Permitted disparities in plan contributions or benefits

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of Title 26 are met.

(E) Indexing permitted

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) Protection against loss

Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) Indexing

For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

(F) Early retirement benefit or retirement-type subsidy

For purposes of this paragraph, the terms "early

retirement benefit" and "retirement-type subsidy" have the meaning given such terms in section 1053(g)(2)(A) of this title.

(G) Benefit accrued to date

For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

***(l)* Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits**

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(i) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(ii) a defined benefit plan (as defined in section

1002(35) of this title) provides for—

(I) payments that constitute the subsidized portion of an early retirement benefit; or

(II) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(B) A voluntary early retirement incentive plan that—

(i) is maintained by—

(I) a local educational agency (as defined in section 7801 of Title 20, or

(II) an education association which principally represents employees of 1 or more agencies described in subclause (I) and which is described in section 501(c) (5) or (6) of Title 26 and exempt from taxation under section 501(a) of Title 26, and

(ii) makes payments or supplements described in subclauses (I) and (II) of subparagraph (A)(ii) in coordination with a defined benefit plan (as so defined) maintained by an eligible employer described in section 457(e)(1) (A) of Title 26 or by an education association described in clause (i)(II),

shall be treated solely for purposes of subparagraph (A)(ii) as if it were a part of the defined benefit plan with respect to such payments or supplements.

Payments or supplements under such a voluntary early retirement incentive plan shall not constitute severance pay for purposes of paragraph (2).

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree

health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which

long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

29 U.S.C. § 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

29 U.S.C. § 625. Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court

shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of

whether equitable relief is sought by any party in such action.

(d)(1) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(A) within 180 days after the alleged unlawful practice occurred; or

(B) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

(2) Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this chapter, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each

time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that

may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or

participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

29 U.S.C. § 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. § 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by

imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

29 U.S.C. § 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization

recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in

the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment

of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

29 U.S.C. § 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions

established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

29 U.S.C. § 632. Omitted

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by

registered mail to the appropriate State authority.

29 U.S.C. § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination;

exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity

Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an

intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of sections 626(d)(3) and 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of

1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

29 U.S.C. § 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

Appendix D

Fair Labor Standards Act

The Fair Labor Standards Act provides in relevant part:

29 U.S.C. § 211. Collection of data

(a) Investigations and inspections

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) State and local agencies and employees

With the consent and cooperation of State agencies charged with the administration of State labor laws, the

Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

(d) Homework regulations

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in

this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

29 U.S.C. § 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be

maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime

compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or

employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties

pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

29 U.S.C. § 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

Appendix E

Government Employee Rights Act of 1991

42 U.S.C. § 2000e-16a. Short title; purpose; definition

(a) Short title

Sections 2000e-16a to 2000e-16c of this title may be cited as the "Government Employee Rights Act of 1991".

(b) Purpose

The purpose of sections 2000e-16a to 2000e-16c of this title is to provide procedures to protect the rights of certain government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) "Violation" defined

For purposes of sections 2000e-16a to 2000e-16c of this title, the term "violation" means a practice that violates section 2000e-16b(a) of this title.

42 U.S.C. § 2000e-16b. Discriminatory practices prohibited

(a) Practices

All personnel actions affecting the Presidential appointees described in section 1219 of Title 2 or the State employees described in section 2000e-16c of this title shall be made free from any discrimination based

on—

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title;

(2) age, within the meaning of section 633a of Title 29; or

(3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of this title.

(b) Remedies

The remedies referred to in sections 1219(a)(1) of Title 2 and 2000e-16c(a) of this title—

(1) may include, in the case of a determination that a violation of subsection (a)(1) or (a)(3) of this section has occurred, such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d) of this title, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title;

(2) may include, in the case of a determination that a violation of subsection (a)(2) of this section has occurred, such remedies as would be appropriate if awarded under section 633a(c) of Title 29; and

(3) may not include punitive damages.

42 U.S.C. § 2000e-16c. Coverage of previously exempt State employees

(a) Application

The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by administrative action

(1) In general

Any individual referred to in subsection (a) of this section may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of Title 5, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred,

the final order shall also provide for appropriate relief.

(2) Referral to State and local authorities

(A) Application

Section 2000e-5(d) of this title shall apply with respect to any proceeding under this section.

(B) Definition

For purposes of the application described in subparagraph (A), the term "any charge filed by a member of the Commission alleging an unlawful employment practice" means a complaint filed under this section.

(c) Judicial review

Any party aggrieved by a final order under subsection (b) of this section may obtain a review of such order under chapter 158 of Title 28. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of Title 28.

(d) Standard of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) of this section if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) Attorney's fees

If the individual referred to in subsection (a) of this section is the prevailing party in a proceeding under this subsection, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 2000e-5(k) of this title.

RESPONDENT'S BRIEF

RECORD AN BRIEFS

Supreme Court, U.S.
FILED
AUG 2 - 2013
OFFICE OF THE CLERK

No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, *et al.*,

Petitioners,

v.

HARVEY N. LEVIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

EDWARD THEOBALD
Counsel of Record
135 S. LaSalle Street
Suite 1920
Chicago, IL 60603
(312) 346-9246
Bears51@aol.com

HARVEY N. LEVIN
1501 West Oakdale
Chicago, IL 60657

Counsel for Respondent

248390

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

STATEMENT 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. THE "QUESTION PRESENTED" IS NOT PRESENTED BY THIS CASE 8

II. THE ADEA DOES NOT PRECLUDE SECTION 1983 CLAIMS BY WORKERS *NOT* COVERED BY THE ADEA 16

III. *SEA CLAMMERS* AND *SMITH V. ROBINSON* ESTABLISH DIFFERENT STANDARDS FOR RESOLVING DISTINCT LEGAL QUESTIONS 20

A. The Two Questions Are Distinct 20

B. The Sea Clammers Standard 22

C. The Smith Standard 23

D. The *Sea Clammers* and *Smith* Standards Are Different 30

Table of Contents

Page

IV. THE ADEA DOES NOT PRECLUDE SECTION 1983 EQUAL PROTECTION ACTIONS.....35

A. The ADEA Does Not Satisfy the *Smith* and *Fitzgerald* Preclusion Standard.....35

B. ADEA Is Not The Exclusive Remedy for Age Discrimination in Employment.....37

C. The Court's Decisions Regarding Title VII Are Controlling Here.....41

V. GERA DOES NOT PRECLUDE SECTION 1983 EQUAL PROTECTION ACTIONS.....49

CONCLUSION.....54

TABLE OF CITED AUTHORITIES

Page

CASES

Alaska v. EEOC,
564 F.3d 1062 (9th Cir. 2009), *cert. denied*,
558 U.S. 1111 (2010) 49

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 26, 42, 43

Alford v. City of Lubbock,
664 F.2d 1263 (5th Cir. 1982) 52

Anderson v. Creighton,
483 U.S. 635 (1987) 47

Board of Education of Hendrick Hudson Central School Dist. v. Rowley,
458 U.S. 176 (1982) 27, 28

Branch v. Smith,
538 U.S. 254 (2003) 28

Carlson v. Green,
446 U.S. 14 (1980) 46

CBOCS v. Humphries,
553 U.S. 442 (2008) 43

Collazo v. Nicholson,
535 F.3d 41 (1st Cir. 2008) 29

Cited Authorities

Page

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 28

Davis v. Passman,
442 U.S. 228 (1979) 6, 16, 17

Dellmuth v. Muth,
491 U.S. 223 (1989) 28

Ex parte McCardle,
74 U.S. 506 (1869) 19

Fitzgerald v. Barnstable School Committee,
555 U.S. 246 (2009) ..... *passim*

Gault v. Garrison,
569 F.2d 993 (7th Cir. 1977), *cert. denied*,
440 U.S. 945 (1979) 52

Gen. Dynamics Land Sys. v. Cline,
540 U.S. 581 (2004) 36

Golden State Transit Corp. v.
City of Los Angeles,
493 U.S. 103 (1989) 18

Great American Federal Savings & Loan Ass'n
v. Novotny,
442 U.S. 366 (1979) 22

Cited Authorities

Page

Gregory v. Ashcroft,
501 U.S. 452 (1991) 16

Henley v. Brown,
686 F.3d 634 (8th Cir. 2012), *cert. denied*,
133 S. Ct. 868 (2013) 31, 43

Izquieerdo Prieto v. Mercado Rosa,
894 F.2d 467 (1st Cir. 1990) 52

J.E.M. Ag Supply, Inc. v.
Pioneer Hi-Bred Int'l, Inc.,
534 U.S. 124 (2001) 28

Johnson v. City of Fort Lauderdale,
148 F.3d 1228 (11th Cir. 1998) 51

Johnson v. Railway Express Agency, Inc.,
421 U.S. 454 (1975) 26, 33, 42, 43

Kendall v. City of Chesapeake, Va.,
174 F.3d 437 (4th Cir. 1999) 40

Kimel v. Florida Bd. Of Regents,
528 U.S. 62 (2000) 7, 35, 36, 54

Lerwill v. Inflight Motion Pictures, Inc.,
343 F. Supp. 1027 (N.D. Cal. 1972) 40

Long v. Fulton County Sch. Dist.,
807 F. Supp. 2d 1274 (N.D. GA. 2011) 41

Cited Authorities

Page

Lorillard v. Pons,
434 U.S. 575 (1978) 47

McKennon v. Nashville Banner Publ'g Co.,
513 U.S. 352 (1995) 41

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n,
453 U.S. 1 (1981) ..... *passim*

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 19

Morton v. Mancari,
417 U.S. 535 (1974) 39

North Haven Bd. Of Ed. v. Bell,
456 U.S. 512 (1982) 42, 43

Opp v. Office of the State's Attorney of Cook Cnty.,
630 F.3d 616 (7th Cir. 2010), *cert. denied*,
132 S. Ct. 92 (2011) 10

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 39, 42, 43

Preiser v. Rodriguez,
411 U.S. 475 (1973) 18, 24, 37, 38

Page

Rancho Palos Verdes, Cal. v. Abrams,
544 U.S. 113 (2005). 23, 31, 32, 34

Smith v. Lomax,
45 F.3d 402 (11th Cir. 1995). 18

Smith v. Robinson,
468 U.S. 992 (1984). . . . . *passim*

Spencer v. Kemna,
523 U.S. 1 (1998). 18

Stubblefield v. City of Jackson,
871 F. Supp. 903 (S.D. Miss. 1994) 51

Vance v. Bradley,
440 U.S. 93 (1979). 52

Vazquez v. Eastern Airlines, Inc.,
579 F.2d 107 (1st Cir. 1978) 46

Zombro v. Baltimore City Police Dept.,
868 F.2d 1364 (4th Cir. 1989). 45, 46, 52

CONSTITUTION, STATUTES AND RULES

U.S. Const. amend. V 16

U.S. Const. amend. XIV . . . . . *passim*

Cited Authorities

Page

U.S. Const. amend. XIV, § 5. 18-19

5 U.S.C. § 7116(b)(4) 43

5 U.S.C. § 2302(b)(1)(B). 43

12 U.S.C. § 3106a 41

15 U.S.C. § 3151(a) 44

20 U.S.C. § 1415(l) 30

22 U.S.C. § 3905(b)(1) 43

22 U.S.C. § 4115(b)(4) 43

26 U.S.C. § 7471(a)(6)(A) 43

28 U.S.C. § 2241(c) 24

29 U.S.C. § 206(d) 41

29 U.S.C. § 623. 10

29 U.S.C. § 626(b) 47, 48

29 U.S.C. § 626(d) 10, 48

29 U.S.C. § 626(d)(1) 1, 33, 44, 48

Cited Authorities

Page

29 U.S.C. § 630(f) ..... *passim*

29 U.S.C. § 633a(c) 50

29 U.S.C. § 717 16

29 U.S.C. § 794 21

42 U.S.C. § 1981 ..... 42, 51, 52

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 2000e *et seq.* ..... *passim*

42 U.S.C. § 2000e(f) 2

42 U.S.C. § 2000e-5(b) 48

42 U.S.C. § 2000e-5(e) 48

42 U.S.C. §§ 2000e-16a to 2000e-16c 49

42 U.S.C. § 2000e-16b(a) ..... *passim*

42 U.S.C. § 2000e-16b(a)(2) 50

42 U.S.C. § 2000e-16b(b)(2) 50

42 U.S.C. § 2000e-16c(a) 49

Cited Authorities

Page

42 U.S.C. § 2000e-16c(b) 50, 52

42 U.S.C. § 5057(a)(1) 44

42 U.S.C. § 6101 44

42 U.S.C. § 12101 *et seq.* 41

42 U.S.C. § 12635(a)(1) 44

47 U.S.C. § 554 44

47 U.S.C. § 332(c)(7)(B)(v) 32

49 U.S.C. § 5332(b) 44

1964 Civil Rights Act, Title VII ..... *passim*

1991 Civil Rights Act 29, 51

Age Discrimination Act of 1975 44

Age Discrimination in Employment Act of 1975 .. *passim*

Americans With Disabilities Act 14

Education for All Handicapped Children Act ... *passim*

Fair Labor Standards Act 39, 40, 47

Page

Federal Water Pollution Control Act 20

Government Employee Rights Act of 1991..... *passim*

Government Employee Rights Act,
105 Stat. 1088, Section 302 .....13, 14

Government Employee Rights Act, 307(h).....14

Government Employee Rights Act, Section 321 13

Habeas Corpus Act 775 ILCS 5/8-102 2

Handicapped Children's Protection Act of 1986 30

Marine Protection, Research and Sanctuaries Act ..20-21

Rehabilitation Act of 1973 .....14, 17, 31

Rehabilitation Act of 1973, § 504.....21

29 C.F.R. §§ 1603.100 50

45 C.F.R. 90 44

45 C.F.R. 91 44

Sup. Ct. Rule 14.1(a) 11

Illinois State Constitution, Article 1, § 2 40

Page

820 ILCS 105/1 *et seq.*.....40

OTHER AUTHORITIES

118 Cong. Rec. 15,895 (1972) 41

H.R. Rep. 99-296.....30

S. Rep. 94-168 (1975).....25

STATEMENT

Harvey Levin, male, was hired in 2000 as an attorney in the office of the Illinois Attorney General. Levin received outstanding evaluations from his supervisors. (Pet.App. 3a). In May 2006, when Levin was 61 years old, he was discharged. Defendants hired a substantially younger female attorney to replace Levin. Two other male attorneys over 50, in the same bureau, were discharged at the same time as Levin, and both were replaced by substantially younger lawyers. Levin contends that he was fired because of his age and gender; the defendants deny that they acted with any such purposes.

In November 2006, Levin filed a charge with the EEOC and the Illinois Department of Human Rights, alleging discrimination on the basis of age and gender. That charge specifically asserted that this discrimination violated Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act (ADEA). The defendants denied that they had discriminated against Levin, but did not then dispute the applicability of Title VII and the ADEA to Levin's claim. In July 2007 the EEOC issued a right to sue letter to Mr. Levin, which authorized him to file suit under Title VII. For reasons not relevant here, no such letter was required to file suit under the ADEA. *See* 29 U.S.C. § 626(d)(1). Levin commenced this action in District Court in August 2007, asserting claims under the ADEA and Title VII.

On September 21, 2007 the defendants moved to dismiss Levin's complaint. In that motion defendants for the first time asserted that Levin was not covered by the ADEA or by Title VII. Section 630(f) of the ADEA

excludes from the definition of an employee protected by the ADEA elected officials and their "appointee[s] on the policymaking level." 29 U.S.C. § 630(f). Title VII contains a similar exclusion. 42 U.S.C. § 2000e(f).

Because the viability of Levin's ADEA and Title VII claims were now in jeopardy, Levin took two precautionary actions. First, on September 27, 2007, Levin amended his federal complaint to add additional counts, alleging that the defendants violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by engaging in intentional age and gender based discrimination. Levin relied on section 1983 as providing the cause of action to enforce these two constitutional equal protection claims. Second, Levin filed a timely complaint with the Illinois Human Rights Commission alleging age and sex discrimination. The Illinois Human Rights Commission has the authority to adjudicate state-law complaints and to order relief. 775 ILCS 5/8-102. (The Illinois Department of Human Rights, where Levin's earlier charge had been filed, only has authority to seek to conciliate such charges). In February 2008, the defendants asked the Illinois Human Rights Commission to stay all administrative proceedings on Levin's state law claim, noting that he had a related claim pending in federal court. The state Commission granted that stay over Levin's objection, and Levin's state law administrative claim has been held in abeyance ever since.

In November 2007 the defendants filed in federal court a second motion to dismiss Levin's Title VII and ADEA claims on the ground that Levin was not covered by those statutes. That motion also argued qualified immunity and asserted that Levin's age-based equal protection claim

was precluded by the ADEA; it did not contend, however, that Levin's gender discrimination equal protection claim was precluded by Title VII. In September 2008 the district court denied the motion to dismiss, holding that Levin was not within the exclusion in the ADEA and Title VII for certain policymaking level employees. That decision did not address the defendants' contention that the ADEA precluded Levin's age-based equal protection claim. (R. 54-55).

In October, 2008, defendants filed a third motion to dismiss. In March 2010, the district judge issued another order on the pending requests for dismissal. In that order the district court held, as it had in 2008, that Levin was not excluded from coverage under the ADEA and Title VII. (Pet. App. 107a-114a). The district court also concluded that the ADEA did not preclude Levin from bringing a 42 U.S.C. § 1983 action alleging intentional age-based discrimination that violated the Equal Protection Clause of the Fourteenth Amendment. (Pet. App. 121a-131a). In rejecting that interpretation of the ADEA, the district judge relied on decisions by this Court that Title VII does not preclude a plaintiff from seeking relief in a section 1983 action for discrimination on the basis of race or gender. (Pet. App. 121a-131a). The district court dismissed Levin's section 1983 age discrimination action on another ground, holding that the defendants were entitled to qualified immunity due to the lack of unanimity of decisions on petitioners' preclusion argument; but it rejected the qualified immunity defense to Levin's section 1983 sex discrimination claim. (Pet. App. 131a-133a). The judge who had ruled on those motions for dismissal then retired, and the case was assigned to another judge.

In July 2011, the new judge, ruling on a defense motion for summary judgment, revisited a number of issues that had been addressed by the first judge. The new district judge, disagreeing with two prior decisions of his predecessor, held that Levin was excluded from coverage under the ADEA and Title VII, and dismissed those statutory claims. On the other hand, the district judge also concluded, in disagreement with the earlier 2010 decision, that Levin's 42 U.S.C. § 1983 age discrimination equal protection claim was not barred by qualified immunity. (Pet App. 5a-7a, 38a-102a). The court held that Levin had adduced sufficient evidence to permit a jury to find that he had indeed been discharged because of his age and gender.

The defendants appealed the denial of qualified immunity. In the court of appeals they renewed their argument that Levin's section 1983 equal protection age discrimination claim was barred by the ADEA. The Seventh Circuit held that the ADEA does not bar a plaintiff from pursuing a section 1983 claim for age discrimination alleged to violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The court of appeals acknowledged that its interpretation of the ADEA was in conflict with decisions in several other circuits. (Pet. App. 1a-37a).

This Court granted review to resolve that conflict, and the district court vacated the May 6, 2013 trial date.

SUMMARY OF ARGUMENT

I. The Question Presented is "[w]hether . . . state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive

remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983." In this case, however, Levin himself is not covered by the ADEA. The district court held that Levin is not an employee within the scope of the ADEA, and there is no realistic possibility of overturning that judgment on appeal. Levin has no interest in whether workers who are covered by the ADEA can bring such section 1983 actions, and the resolution of that issue would not affect Levin's own claim.

Petitioners suggest that this Court decide whether the Government Employees Rights Act ("GERA") precludes Levin from bringing a section 1983 equal protection action. That issue, however, is not within the scope of the question presented. GERA and the ADEA are entirely separate statutes, and the petition never mentioned GERA. Petitioners never relied on GERA in the courts below, and have waived this issue. Moreover, there is no circuit conflict regarding the effect of GERA on the ability of an employee to bring a section 1983 complaint alleging intentional age-based discrimination that violates the Equal Protection Clause of the Fourteenth Amendment.

II. The circumstances of this case do present a question about whether the ADEA bars section 1983 claims by workers who are *not* covered by the ADEA, leaving such age-discrimination victims with neither remedy. That issue also was never raised below, and it is unclear whether petitioners claim the ADEA has any such impact.

The ADEA does not bar section 1983 equal protection claims alleging intentional age discrimination brought by

non-covered workers. Rather, the ADEA simply leaves undisturbed whatever remedies those non-covered workers otherwise possess. *Davis v. Passman*, 442 U.S. 228 (1979), held in an analogous situation that the exclusion of certain federal workers from the protections of Title VII does not constitute a limitation on constitutional judicial remedies for the excluded workers.

III. This Court's decisions in *Middlesex Cnty Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984), address distinct questions. The issue in *Sea Clammers* is whether, when Congress adopts a statute establishing a new legal right, it intends that, in addition to whatever enforcement mechanisms the statute itself contains, the statutory right can also be enforced through the cause of action provided by section 1983. However, unlike in *Sea Clammers*, Levin's complaint does not seek to use 42 U.S.C. § 1983 to enforce the statutory provisions of the ADEA. Rather, Levin's complaint alleges that defendants-petitioners violated the Equal Protection Clause of the Fourteenth Amendment by engaging in intentional age based discrimination by and through 42 U.S.C. §1983.

The issue in *Smith* is whether, when Congress creates a new legal right, it intends to reduce the remedies and protections previously available under a pre-existing independent right.

Because these lines of cases present different questions, they are governed by different legal standards. Under *Sea Clammers* the central question is whether the particular remedies provided by the statute in question to enforce the statutory rights are incompatible with

permitting enforcement of those rights through section 1983. That question usually turns on whether the statute itself contains a private cause of action.

Under *Smith* a statutory scheme does not bar use of section 1983 to enforce a constitutional right unless (a) the statutory scheme was created for the purpose of enforcing that constitutional right, and (b) Congress intended that scheme to be the exclusive method of enforcing that constitutional right, displacing pre-existing remedies. That standard was satisfied in *Smith* because Congress had adopted the statute in that case for the express purpose of enforcing the equal protection rights of handicapped children, and the uniquely elaborate statutory scheme of rights and procedures was fashioned by Congress to be "the most effective vehicle" for protecting those rights. 468 U.S. at 1012-13.

IV. The ADEA clearly does not meet the *Smith* and *Fitzgerald* standard. "[I]t is clear that the ADEA cannot be understood as responsive to, or as designed to prevent, unconstitutional behavior." *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 86 (2000). A fortiori the ADEA was not intended to be the exclusive remedy for unconstitutional age discrimination in violation of the Equal Protection Clause.

This Court has repeatedly held that Title VII does not preclude victims of race or gender based discrimination in employment from obtaining relief under other federal law. The purpose of Title VII and the ADEA were to supplement, not supplant, already existing remedies. Petitioners do not ask this Court to overturn those deeply entrenched precedents. Petitioners can offer no

persuasive reason why Congress would have wanted age discrimination to be treated differently than discrimination claims under Title VII.

V. GERA does not preclude section 1983 actions by the workers to whom it applies. Like Title VII, and the ADEA, GERA was not enacted to provide redress for constitutional violations. Petitioners do not suggest that GERA would bar a race or gender discrimination equal protection § 1983 claim by a covered worker. GERA cannot have a preclusive effect for age-based equal protection constitutional claims; GERA applies equally to all covered forms of discrimination.

ARGUMENT

I. THE "QUESTION PRESENTED" IS NOT PRESENTED BY THIS CASE

(1) This Court granted certiorari in this case to decide whether a state and local government employee covered by the ADEA may bring a section 1983 claim for age discrimination alleged to violate the Equal Protection Clause. The Question Presented was specifically framed to address the circumstance of those covered employees: "Whether the Seventh Circuit erred in holding . . . that state and local government employees may *avoid* the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983." (Pet.Br. i)(emphasis added). "This case asks whether state and municipal employees may *avoid* the remedial regime established by the . . . ADEA . . . by using 42 U.S.C. § 1983 and the Equal Protection Clause

to bring age discrimination claims against their public employers." (Pet.Br. 2)(emphasis added). Only an employee who has a claim which *could* be raised under the ADEA administrative provisions might be said to have "avoid[ed]" those provisions by instead filing a section 1983 claim.

The petition emphasized that covered employees who wish to file an ADEA suit are required, before doing so, to first notify the EEOC of their intent to sue; such notice, petitioners stressed, could lead to EEOC conciliation efforts to resolve the underlying dispute. (Pet. 13-14). If covered employees could also bring section 1983 equal protection claims, the petition warned, those workers could "bypass" the ADEA administrative process applicable to their claims. (Pet. 15, 17, 21, 22; see *id.* at 14 ("evade"), 19 ("circumvent")).

However, petitioners now acknowledge that Levin is *not* covered by the ADEA. (Pet. Br. 5, 37). Section 630(f) of the ADEA excludes from the definition of an "employee" protected by the ADEA certain state and local workers. "The term 'employee' . . . shall not include any person elected to public office in any State or political subdivision of any State . . . , or any person chosen by such officer to be on such officer's personal staff, or any appointee on the policymaking level . . . ." 29 U.S.C. § 630(f). In the district court defendants argued, ultimately successfully, that Levin was excluded by section 630(f) from the coverage of the ADEA. In 2011 the district court concluded, as the defendants had repeatedly urged, that "Levin is not an 'employee' covered by . . . the ADEA," and therefore dismissed his ADEA claim. (Pet.App. 68a). There is no realistic possibility that this determination will be overturned on appeal. The district court applied binding

Seventh Circuit precedent regarding Assistant State's Attorneys. (Pet. App. 60a-68a)(citing *Opp v. Office of the State's Attorney of Cook Cnty.*, 630 F.3d 616 (7th Cir. 2010), *cert. denied* 132 S.Ct. 92 (2011)).[1]

A worker such as Levin who is not an employee under section 630(f) is neither required nor entitled to file a notice with the EEOC under section 626(d), because he or she has no claim under section 623 of the ADEA. Such workers neither need nor may invoke, and thus could not "bypass," the conciliation process established by section 626(d). Levin could no more "evade" the section 626(d) notice and conciliation process than a woman could evade the draft. Despite the fact that the ADEA and its section 626(d) enforcement scheme do not apply to Levin himself, petitioners devote much of their brief to the importance of that section 626(d) process. (E.g., Pet. Br. 20-24). Under the Seventh Circuit decision, petitioners object, "public-sector workers . . . could ignore every one of the ADEA's requirements." (Pet. Br. 9). But those requirements simply did not apply to Levin himself.

Although there is a circuit conflict regarding whether state and local workers covered by the ADEA may bring a section 1983 equal protection claim for age discrimination, the resolution of that issue would have no effect on the outcome of the instant litigation. Petitioners do not argue otherwise; when their merits brief does focus on Levin's own claim, they contend only that Levin's section 1983

---

1. We noted that holding in our brief in opposition. (Br. Opp. 3). The petition mentioned that "respondent is exempt from the ADEA's protections, for he is not an 'employee' within the meaning of the Act." (Pet. 16).

action is barred by a different statute, the Government Employee Rights Act of 1991 (GERA). (See pp. 49-54, infra). But petitioners do not assert that the resolution of their GERA argument, regarding the effect of GERA on workers *not* covered by the ADEA, turns on whether the ADEA bars section 1983 constitutional equal protection claims by workers who *are* covered by the ADEA. If Levin were to bring a declaratory judgment action seeking a determination that ADEA-covered employees can maintain a section 1983 equal protection claim asserting age discrimination, that action would be dismissed for want of Article III standing.[2]

(2) The circumstances of this case could pose the question of whether the decision of Congress to *exclude* a worker or claim from the scope of the ADEA bars an excluded worker from pursuing a section 1983 equal protection constitutional claim.

That issue, however, is not fairly included in the question presented. Sup. Ct. Rule 14.1(a). The question presented concerns workers who *are* covered by the ADEA—those who would be in a position to "avoid" using the ADEA administrative provisions—not workers excluded from the protections of the ADEA. The question of whether workers excluded from coverage of the ADEA may pursue a section 1983 claim is not a "subsidiary" issue that is necessary or relevant to the question of whether covered workers may advance such claims. With regard to workers who are covered by the ADEA, the question at issue is whether Congress wanted those workers to have only a single remedy for age discrimination, the

2. Mr. Levin is now in private practice.

remedy provided by the ADEA. With regard to workers who are excluded from ADEA coverage, the controlling issue would be whether Congress wanted to deny those workers any remedies at all for age discrimination under the constitution. (See pp. 16-20, infra).

It is unclear whether petitioners contend that the ADEA precludes section 1983 equal protection actions by workers who are not covered by the ADEA itself. In any event, petitioners never advanced any such argument in the courts below, and it has been waived. Moreover, resolution of this issue is of insufficient importance to warrant use of this Court's limited resources. There assuredly is no circuit conflict regarding this exceedingly uncommon question.

(3) Petitioners' merits brief does argue that Levin's section 1983 equal protection age discrimination claim is precluded by the Government Employees Rights Act. (Pet. Br. 37). But that issue assuredly is not fairly included within the question presented and it was never raised in the courts below.

The question presented in the petition is expressly about, and limited to, the ADEA itself. The petition never mentions GERA. Although petitioners' merits brief now refers to GERA as one of the "statutes involved" (Pet. Br. 2), the provisions of GERA were not included in the "statutes involved" set out in the petition itself. Petitioners' new argument regarding GERA is not fairly encompassed within the question presented, which is limited to a question about the meaning of the ADEA itself. Whether the ADEA precludes section 1983 equal protection constitutional claims does not turn on whether GERA precludes such claims, or vice versa. The ADEA and GERA age discrimination claims are by definition

mutually exclusive; GERA only applies to individuals who are excluded from coverage under the ADEA.

Petitioners repeatedly but incorrectly describe GERA as if it were part of the ADEA. Petitioners' brief refers to "[t]he ADEA, with its exhaustive procedures and remedies, *including* special rules for certain state and local government employees." (Pet. Br. 10)(emphasis added). "[T]he ADEA creates a . . . detailed remedial regime . . . . [T]hat regime *includes* special procedures for certain government employees [such as] the plaintiff." (Pet. Br. 19)(emphasis added).[3] That is not correct. GERA, enacted in 1991, is emphatically neither a part of, an amendment to, nor codified with, the ADEA. GERA is a separate freestanding statute.[4]

As originally enacted in 1991, most of GERA dealt with discrimination against Senate employees, and it created a detailed remedial scheme for those federal workers. 105 Stat.1088. Section 302 forbade discrimination against Senate employees on the basis of race, color, religion, sex, national origin, age, disability or handicap. *Id.* Section 321 of GERA provided that the prohibitions and remedies applicable to Senate employees under sections

---

3. Under the heading "the ADEA creates a comprehensive remedial regime," the brief states that "Congress also focused on certain state and local government employees and created special rules for these officials . . . ." (Pet. Br. 19). *See* Pet. Br. 30 ("The Government Employee Rights Act of 1991 . . . makes *the ADEA's remedial regime* still more comprehensive by 'extend[ing] protections against discrimination based on . . . age . . . to [these] previously exempt high-level state employees.'"(Emphasis added)

4. The portion of GERA that remains in effect is codified with Title VII in Title 42 of the United States Code, not in or after the ADEA provisions in Title 29.

302 and 307(h) would apply as well to state and local government workers, as well as to certain Presidential appointees, who had previously been excluded from coverage under the ADEA, Title VII, and the Americans With Disabilities Act. Section 321 directed the EEOC to establish an administrative process for resolving complaints under that section. In 1995 Congress repealed the provisions regarding Senate employees, dealing with those workers in separate legislation, and rewrote GERA so that the substantive and remedial provisions originally incorporated by reference into section 321 were now written into the successor of that provision. GERA is no more a part of the ADEA than it is a part of Title VII, the Rehabilitation Act, or the Americans with Disabilities Act.

Petitioners repeatedly describe GERA as providing a remedy to enforce the "ADEA protection" applicable to employees such as Levin, as if the ADEA itself somehow forbade discrimination against workers who were not "employees" under the ADEA, and GERA merely provided an enforcement mechanism for that ADEA right. "Congress also created a specialized, administrative process that certain high-ranking public-sector employees must follow to vindicate their *rights under the ADEA*." (Pet.Br. 2)(emphasis added). "[H]igh-level policymakers and government attorneys may seek *the ADEA's protection* only through a specialized administrative procedure." (Pet. Br. 9)(emphasis added).[5]

5. *See* Pet. Br. 36 ("[H]igh-level policymakers and government attorneys . . . now receive *ADEA protections* by operation of GERA")(emphasis added), 48 ("Congress simply concluded that, given their high station and the nature of their work, these officials must pursue *their ADEA rights* through a specially designed, administrative process.") (emphasis added).

That is not correct. The ADEA never did and still does not apply to, or protect, state and local government workers who are excluded by section 630(f) from the definition of an employee under the ADEA. The only statutory prohibition regarding age discrimination against such employees is in GERA itself. 42 U.S.C. § 2000e-16b(a). However, Levin's complaint does not seek to use 42 U.S.C. § 1983 to enforce the statutory provisions of the ADEA, GERA or any statutory provision. Rather, Levin's complaint alleges that defendants-petitioners violated the Equal Protection Clause of the Fourteenth Amendment by engaging in age based discrimination.

This Court would not have granted review to determine whether GERA precludes section 1983 equal protection claims regarding age discrimination. There are no circuit court decisions at all about that question. The EEOC receives only a handful of complaints a year under GERA nationwide. The issue is thus of little importance.

In the instant case, any GERA-based defense to Levin's section 1983 equal protection claim was assuredly waived. The defendants did not argue in either the district court or the court of appeals that Levin's equal protection claim was barred by GERA, and neither lower court ever addressed that issue. It was not until petitioners' merits brief in this Court, filed six years after Levin's original district court complaint, that the defendants for the first time raised this issue.

Under these circumstances, the Court may wish to dismiss the petition as improvidently granted.

II. THE ADEA DOES NOT PRECLUDE SECTION 1983 CLAIMS BY WORKERS *NOT* COVERED BY THE ADEA

The only question regarding the ADEA actually presented by the circumstances of this case is whether the ADEA precludes a section 1983 age-based equal protection claim by an employee (like Levin) who is *not* covered by the ADEA. That issue was not raised in the courts below and is not within the scope of the Question Presented. It is unclear whether petitioners even contend that the ADEA bars such claims. In any event, prior decisions of this Court make clear that the ADEA has no such effect.[6]

This Court in *Davis v. Passman*, 442 U.S. 228 (1979) rejected a contention that Title VII precluded the constitutional claims of an employee not covered by Title VII. As originally enacted, §717 of Title VII was limited to the competitive service. 86 Stat. 111. In *Davis* a federal employee who was not in the competitive service, and who thus was excluded from the protections of § 717, brought suit for gender-based discrimination under the Due Process Clause of the Fifth Amendment. This Court

---

6. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the plaintiffs asserted age discrimination claims under both the ADEA and the Equal Protection Clause. The Court held that the plaintiffs were "policymaking level" employees, and thus not "employee[s]" within the scope of the ADEA. 29 U.S.C. § 630(f). The Court then resolved on the merits the constitutional claim asserted by the plaintiffs. Although amicus briefs were filed in that case by 15 states, the National Governors' Conference, and the National League of Cities, neither they nor the defendant questioned the authority of this Court to address the constitutional claims.

rejected the argument that Congress' decision to exclude the plaintiff from the protections of Title VII barred her constitutional claim.

> The Court of Appeals apparently interpreted § 717 of Title VII . . . as an explicit congressional prohibition against judicial remedies for those in petitioner's position. When § 717 was added to Title VII to protect federal employees from discrimination, it failed to extend this protection to . . . employees such as petitioner who are not in the competitive service. . . . There is no evidence, however, that Congress meant § 717 to foreclose alternative remedies available to those not covered by the statute. Such silence is far from "the clearly discernible will of Congress" ... On the contrary, § 717 leaves undisturbed whatever remedies petitioner might otherwise possess.

442 U.S. 247 (footnote omitted).

Smith v. Robinson addressed a similar question regarding the preclusive impact of the Education for All Handicapped Children Act ("EHA"). The Court held that the EHA precludes only those claims under the Rehabilitation Act that would also be actionable under the EHA. "Of course, if a State provided services beyond those required by the EHA, but discriminatorily denied those services to a handicapped child, § 504 would remain available to the child as an avenue of relief." 468 U.S. at 1020 n. 22; see 468 U.S. 1013 (the EHA precludes § 1983 equal protection claim "where the EHA is available to a handicapped child asserting a right . . . based . . . on

the Equal Protection Clause"), 1021 ("We emphasize the narrowness of our holding. We do not address a situation where the EHA is not available or where §504 guarantees substantive rights greater than those available under the EHA.")

Similarly, *Preiser v. Rodriguez* held that the Habeas Corpus Act does not bar § 1983 actions by a current or former inmate who seeks damages for allegedly having been improperly imprisoned. Because an action for monetary relief is not cognizable in a habeas corpus action, the Court reasoned, the Act does not preclude such §1983 actions. 411 U.S. 475, 499 (1973); *see also: Spencer v. Kemna*, 523 U.S. 1, 19 (1998) (Souter, J., concurring) (no preclusion for § 1983 after plaintiff no longer covered by habeas statute); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106-09 (1989).

Petitioners appear to suggest that Congress excluded certain workers, and practices, from the scope of the ADEA, because Congress affirmatively wanted to permit age-based discrimination against the excluded workers. Regarding the exclusions in § 630(f), petitioners seem to assert there is "clear evidence in the ADEA that Congress intended to disqualify certain high-level state workers from bringing suit for alleged age discrimination" under the Equal Protection Clause. (Pet. 22). However, such arguments have been rejected. *Smith v. Lomax*, 45 F.3d 402, 407-408 (11th Cir. 1995).

On petitioners view, the purpose of limiting the protections of the ADEA to workers 40 and older, was to legalize age based discrimination against younger workers. But Congress has no authority under §5 of the

Fourteenth Amendment to legalize actions that violate the Constitution. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Congress' power under §5 is limited to adopting measure to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees. *Id.* 458 U.S. 732-33.

Congress could not by statute directly nullify the requirements of the Equal Protection Clause. Petitioners appear to suggest, however, that Congress intended the ADEA to accomplish the same thing indirectly, by selectively excluding certain constitutional claims from the rights enforceable under section 1983. A statute which expressly provided that the cause of action in § 1983 could not be used to enforce a particular constitutional right, like a law stripping federal courts of jurisdiction over such a constitutional claim, would raise serious constitutional questions. *See Ex parte McCardle*, 74 U.S. 506 (1869). The ADEA should be construed in a manner that avoids that troubling constitutional issue.

III. *SEA CLAMMERS* AND *SMITH V. ROBINSON* ESTABLISH DIFFERENT STANDARDS FOR RESOLVING DISTINCT LEGAL QUESTIONS

A. The Two Questions Are Distinct

This case concerns the difference between two distinct legal questions to which this Court's decisions establish different answers.

The first question is whether, when Congress adopts a statute creating a new legal right, it intends that, in addition to whatever enforcement mechanisms the statute itself establishes, the statutory right can also be enforced through the cause of action provided by section 1983. Section 1983 is part of the background against which modern legislation is enacted; Congress is assumed to understand that the laws it adopts will be enforceable through the cause of action provided by §1983 if rights created by those laws are violated by officials acting under color of state law. But Congress could expressly provide that a newly created right may not be enforced through a section 1983 cause of action. Even in the absence of such an express bar, the remedies or procedures available in a section 1983 action might be so clearly inconsistent with the particular enforcement scheme that is part of the statute as to demonstrate that Congress intended that the statutory rights would be enforced only under the terms of those specific enforcement provisions, and not also by means of a section 1983 action.

Thus in *Sea Clammers*, the plaintiffs sought to use § 1983 to enforce the substantive rights created by the Federal Water Pollution Control Act and the Marine

Protection, Research and Sanctuaries Act. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) The issue there was whether Congress intended to permit a section 1983 cause of action, in addition to the remedies provided by those two statutes, to enforce the statutory rights. However, unlike in *Sea Clammers*, Levin's complaint does not seek to use § 1983 to enforce the ADEA.

The second question is whether, when Congress creates a new legal right, it intends to *reduce* remedies and protections under some other, pre-existing independent right. In *Smith,* parents claiming that their son was not receiving an appropriate education asserted a claim under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and a § 1983 equal protection claim. *Smith v. Robinson*, 468 U.S. 992, 994 (1984). The defendants contended that in enacting the EHA, Congress intended to preclude parents from pursuing such § 504 and § 1983 equal protection claims, claims that those plaintiffs clearly could have asserted prior to 1975. The preclusion issue in *Smith* regarding the plaintiffs' pre-existing statutory rights and remedies under the Rehabilitation Act did not involve any question regarding § 1983. On the other hand, the defendants' argument in *Smith* regarding the plaintiffs' equal protection claim necessarily concerned the applicability of the §1983 cause of action, because Congress could not by statute have narrowed the underlying constitutional rights at issue. Here the question, as in *Smith*, is whether the ADEA precludes the plaintiff from asserting his pre-existing section 1983 equal protection claim.

This Court distinguished between these two questions in *Smith* itself. The body of the Court's opinion is devoted to the second question, holding that the EHA bars enforcement in certain circumstances of the Rehabilitation Act and constitutional claims that existed prior to the enactment of the EHA. 468 U.S. at 1010-13 (constitutional claim barred), 1016-20 (Rehabilitation Act claim barred). *Smith* referred separately to the first question, mentioning in a footnote that "[c]ourts generally agree that the EHA may not be claimed as the basis for a § 1983 action." 468 U.S. at 1009 n. 11. The Court also distinguished between these two questions in *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 377-78 (1979).

B. The Sea Clammers Standard

Under *Sea Clammers*, in the absence of an express provision addressing the issue, whether a section 1983 cause of action can be used to enforce a statutory right will usually depend on the nature of the enforcement mechanisms contained in the statute itself. Often the existence or absence of a private cause of action in that statute is of importance.

Section 1983 does not conflict with a statutory remedial scheme merely because section 1983 adds another method of enforcement, or provides an additional remedy. Statutes sometimes have several different types of enforcement provisions, and the addition of a private civil action might complement those other types of enforcement measures. Thus when a statutory scheme lacks an express private cause of action, it is unlikely that utilization of the cause of action in section 1983 to enforce that statute would be inconsistent with the statute itself. This Court noted in

Rancho Palos Verdes that "in *all* of the cases in which we have held that § 1983 *is* available for a violation of a federal statute, we have emphasized that the statute at issue . . . *did not* provide a private judicial remedy . . . for the rights violated." *Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005)(emphasis in original).

On the other hand, where a statute's enforcement provisions already include a private cause of action, the utilization of section 1983 as a second private cause of action to enforce that statute might well be inconsistent with the statutory scheme. The statutory and section 1983 causes of action could be so irreconcilable that it would simply make no sense for both of them to apply to the same substantive rights. For example, in *Rancho Palos Verdes* the statutory cause of action had to be commenced within 30 days after final action by the government entity at issue; a section 1983 cause of action would have been subject to a multi-year limitations period. 544 U.S. at 116, 122. The statutory scheme was inconsistent with the availability of a section 1983 cause of action because the limitations period governing a civil action to enforce a particular right cannot be *both* 30 days and several years; it has to be one or the other.

C. The Smith Standard

Smith v. Robinson, 468 U.S. 992 (1984), and *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), delineate the standard that must be met to demonstrate that Congress intended that a statute preclude use of § 1983 to enforce a particular constitutional right. The defendants must show both that Congress adopted the statute as a method of enforcing that constitutional right, and also that

Congress intended that statutory enforcement remedy to be the exclusive method of enforcing that constitutional right. *Smith*, 469 U.S. at 1009 ("the question to be asked . . . is whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those [constitutional] claims"); *Fitzgerald*, 555 U.S. at 256 (burden on the defendant to show that Congress saw Title IX as the "sole" means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.) The focus of this inquiry, unlike the issue in *Sea Clammers*, is not how Congress intended that the statutory rights in the EHA or Title IX would be enforced, but on whether Congress in adopting those statutes intended to enforce a particular constitutional right, and if so, whether it intended this new method of enforcing the Constitution to be *exclusive*.

The first element of the *Smith/Fitzgerald* test is a demonstration that in enacting a given statute Congress intended the legislation, not merely to enforce the rights established by the statute itself, but also to provide a remedy for a constitutional right. In *Smith* that showing was made in several ways. The EHA itself expressly stated that one purpose of the legislation was to protect the "equal protection rights of handicapped children." Section 3 of the EHA explained that the purpose of the legislation was "to assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."[7]

---

7. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), there was textual evidence that Congress intended to provide a remedy for constitutional violations when it adopted the habeas corpus act. 411 U.S. at 483 (quoting 28 U.S.C. § 2241(c)).

The legislative history of the EHA specifically emphasized the need to assure that handicapped children had access to the appropriate public education which several courts had held was guaranteed by the Equal Protection Clause. 468 U.S. at 1010. The Senate Report explained the intent of Congress was to provide a remedial mechanism to enforce the constitutional rights of handicapped children. S.Rep. 94-168, p. 9 (1975). Further, the EHA applied to the very individuals—handicapped children in public schools—whose constitutional rights were at stake. *Smith*, 468 U.S. at 1009 ("petitioner's constitutional claims . . . are . . . virtually identical to their EHA claims").

In *Fitzgerald*, on the other hand, there was no showing that Congress had enacted Title IX to provide redress for an identified constitutional problem. The text of Title IX, like the ADEA, contains no reference to equal protection or any other constitutional right. Because there was a lack of congruity between the schools and practices covered by Title IX, and the schools and practices subject to the Equal Protection Clause, the Court concluded it was unlikely that Congress intended Title IX to be a remedy—least of all an exclusive remedy—for equal protection violations. "In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Fitzgerald*, 555 U.S. at 252-53.

Second, there must be a showing that Congress intended the statutory scheme in question to be the

exclusive remedy for the constitutional right. *Fitzgerald*, 555 U.S. at 252 ("exclusive avenue"), 256 ("sole means"). Such a showing is necessary to meet a defendant's burden of proving that the statutory scheme was actually intended to supplant, rather than merely supplement, enforcement of that constitutional right under section 1983. Congress often adopts a series of overlapping statutes and remedial schemes to deal with a single problem. *Sea Clammers* recognized that Congress had enacted complementary environmental protection laws, noting that the Court's decision left unaffected civil actions to enforce federal anti-pollution laws other than the two particular statutes at issue in that case. 453 U.S. 1, at 20 n. 31. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), the Court noted that "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." Where Congress creates complementary provisions to address a particular problem, those provisions will ordinarily have different remedies or procedural schemes. Such differences alone cannot demonstrate that one provision was intended to preclude use of the other; Congress may simply have intended to provide several tools for addressing a difficult problem.[8] Thus the mere fact that a statute was adopted to provide a remedy for a constitutional violation does not, without more, establish that the law was intended to be the only such remedy, displacing section 1983 actions or any other pre-existing right or remedy.

---

8. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975) ("Congress has made available to the claimant . . . independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true").

The Court in *Smith* concluded Congress intended the EHA to be the exclusive means for enforcing the equal protection rights of handicapped children because "[t]he legislative history [of the EHA]. . . indicates that Congress perceived the EHA as *the most effective vehicle* for protecting the constitutional right of a handicapped child to a public education." 468 U.S. at 1012-13 (emphasis added). The comprehensive scheme established by the EHA is described in detail in *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982). The elaborate system of rights and procedures created by the EHA resembled a detailed judicial decree, and was in fact modeled after the judgments in two landmark equal protection cases on which Congress heavily relied. 458 U.S. at 192-95. Under the EHA an "individualized educational program," containing a number of required elements, must be developed to meet the needs of each child, through a highly structured process spelled out in the statute.

This Court in *Smith* reasoned, "we find it difficult to believe that Congress also meant to leave undisturbed the ability to go directly to court with an equal protection claim to a free appropriate public education." "No federal district court presented with a constitutional claim to a public education can duplicate that process." 468 U.S. at 1011-12 (footnote omitted). "The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought." *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

The decision in *Smith* emphatically did not turn (as would at least usually be true under *Sea Clammers*) on whether the EHA provided to parents—at the end of this highly structured administrative process to enforce the litany of EHA rights—a private cause of action to enforce a claim that their handicapped child had been denied an adequate education. The EHA does not permit a judge to make a *de novo* determination of whether a handicapped child is receiving a free appropriate education. To the contrary, only two years before *Smith* the Court held in *Rowley* that federal courts have only very limited authority to entertain claims of a violation of the EHA's substantive rights. 458 U.S. at 207.

The demanding standard in *Smith* and *Fitzgerald* is supported by the presumption against repeal by implication of pre-existing rights or remedies. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). There must be "irreconcilable conflict" between two statutes in order to find preclusion. *Branch v. Smith*, 538 U.S. 254, 273 (2003). "Evidence of congressional intent [to preclude] must be both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). The standard for repeals by implication is a demanding one. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001)("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.") This presumption has even greater force where, as here, the question is whether a statute whose purpose was an expansion of protection precludes use of §1983 to enforce a pre-existing constitutional right. "[W]e should not lightly conclude that Congress intended to preclude reliance

on §1983 as a remedy for a substantial equal protection claim." *Fitzgerald v. Barnstable School Committee*, 555 U.S. at 256 (quoting *Smith*, 468 U.S. at 1012).

A bar to the enforcement of pre-existing means of enforcing constitutional rights could well mean that remedies were significantly reduced, or even eliminated, for some whose rights had been violated. For example, a plaintiff who establishes a violation in a section 1983 case would be entitled to compensatory damages. On the other hand, the lower courts have unanimously agreed that compensatory damages are not available under the ADEA. If the ADEA bars section 1983 age-based equal protection claims by state and local government employees, that would reduce the remedies previously available for those constitutional violations, and would leave some victims of constitutional violations with no meaningful relief at all. For example, age-based harassment (like sexual or racial harassment) often does not result in lost wages; the ADEA itself thus provides no monetary relief for such harassment,[9] even though such relief would be available in a section 1983 equal protection action. Because it is unlikely that Congress would intend such a retrogressive consequence, the courts should not assume absent some unequivocal demonstration that Congress wanted to remove what for some workers would be the only meaningful monetary relief that exists for the violation of a pre-existing right.

The 1991 Civil Rights Act did not, as petitioners assert, endorse the decision in *Smith*. (Pet. Br. 32-33). But this dispute is beside the point, because we have no

9. *Collazo v. Nicholson*, 535 F. 3d 41, 45 (1st Cir. 2008).

quarrel with the standard actually utilized by this Court in *Smith*, and more recently in *Fitzgerald*. The legislative events of 1991 do not, as petitioners assert, reveal "failed efforts to overturn portions of *Smith*." (Pet. Br. 33). To the contrary, Congress in 1986 had already overturned *Smith*. The Handicapped Children's Protection Act of 1986 expressly authorized counsel fees in disputes about the education of a handicapped child (the specific issue in *Smith*) and provided as well that nothing in the EHA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal Statutes protecting the rights of handicapped children and youth." 20 U.S.C. § 1415(l). The accompanying House report expressed disagreement with *Smith*'s interpretation of the EHA.[10] That history illustrates the need for caution in construing statutes to preclude by mere implication either the enforcement of pre-existing statutory rights or the use of § 1983 to enforce constitutional rights.

D. The *Sea Clammers* and *Smith* Standards Are Different

There is not, as petitioners suggest, a single standard governing both of the distinct issues in *Sea Clammers* and *Smith*. (Pet. Br. 13, 17). If, as petitioners contend, those questions were governed by such a common standard, it would necessarily follow as to any given statute that the two questions would always have the same answer. On petitioners' theory, whenever Congress intends to preclude use of §1983 to enforce a newly created right, it necessarily intends as well to bar use of §1983 to enforce

10. H.R.Rep. 99-296, p. 4.

any related pre-existing constitutional or statutory right, and to bar enforcement in any other way of all related pre-existing statutory claims, such as the Rehabilitation Act claims at issue in *Smith*.

But it assuredly is not true that in every case in which Congress does not want a new statutory right enforced under section 1983, it also intends to bar enforcement of all pre-existing rights under other statutes or in the Constitution. *Sea Clammers* itself insisted that the unavailability of § 1983 to enforce the two particular federal anti-pollution statutes at issue in that case in no way limited the plaintiff's right to seek redress under any *other* federal environment protection statutes. "The legislative history makes clear Congress' intent to allow further enforcement of antipollution standards arising under *other* statutes or state common law." 453 U.S. at 20 n. 31 (emphasis in original). Similarly, in *Rancho Palos Verdes* this Court emphasized that although the plaintiff there could not use § 1983 to enforce the TCA, its decision did not restrict the plaintiff's right to rely on § 1983 to enforce any other federal right that might be implicated by the dispute at hand. 544 U.S. at 126. And the Court in *Novotny*, although holding that a "deprivation of a right created by Title VII cannot be the basis for a cause of action under §1985(3)," 442 U.S. at 378, made clear that the enactment of Title VII did not preclude §1985(3) actions to enforce constitutional rights. 442 U.S. at 372 (majority opinion), 379 (Powell, J., concurring). The lower courts have repeatedly concluded that the intent of Congress, in adopting particular statutes which cannot be enforced through § 1983, was to nonetheless permit § 1983 actions to enforce other, independent rights.[11]

---

11. *E.g.*, *Henley v. Brown*, 686 F.3d 634,642 (8th Cir. 2012) (citing cases).

Petitioners efforts to fashion a single standard governing *Sea Clammers* and *Rancho Palos Verdes* on the one hand, and *Smith* and *Fitzgerald* on the other, illustrate the difference between these cases.

(1) Petitioners argue that *Sea Clammers* and *Smith* both hold that a "comprehensive remedial scheme" bars a § 1983 action. (Pet. Br. 11, 15, 45, 47-48). But this contention rests on using the vague phrase "comprehensive remedial scheme" to refer to quite different requirements. Under *Sea Clammers* and *Rancho Palos Verdes*, a statutory enforcement scheme will usually preclude use of section 1983 to enforce the statutory rights if that scheme itself includes a private cause of action. The actual decision in *Rancho Palos Verdes* has nothing to do with comprehensiveness. "We . . . hold that the TCA—by providing a judicial remedy different from § 1983 in § 332(c)(7) itself—precluded resort to § 1983." 544 U.S. at 127. In *Rancho Palos Verdes*, the enforcement provision which was "central to the . . . case" consisted of a single sentence creating a private cause of action. 544 U.S. at 116 (quoting 47 U.S.C. § 332(c)(7)(B)(v)). Although *Sea Clammers* did characterize the anti-pollution measures in that case as having a comprehensive enforcement scheme, the determinative aspect of the statutes in that case was that each had a private cause of action with requirements different than those governing section 1983.

Conversely, although the comprehensiveness of a statutory enforcement scheme is relevant under *Smith* and *Fitzgerald*, the mere existence of a private cause of action does not render a statutory scheme "comprehensive." The existence of a cause of action under the EHA played no role in the *Smith* analysis. What mattered in *Smith* was

the creation by Congress of a "comprehensive federal-state scheme for the provision of special education to handicapped children." *Smith*, 468 U.S. at 1002. Even under *Smith*, moreover, the comprehensiveness of a statutory scheme is not controlling in and of itself, but matters only to the extent that Congress intended the scheme to be the exclusive means of enforcing the constitutional right at issue. *See Smith*, 468 at 1010. Thus, because of the absence of such a showing that Congress intended Title VII to be the exclusive method by which a plaintiff could enforce pre-existing rights, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), held that "[d]espite Title VII's range and its design as a *comprehensive* solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." (Emphasis added).

In determining whether a statutory right can be enforced through section 1983, as in *Sea Clammers*, petitioners' proposed "comprehensive remedial scheme" standard would usually require only that the statute contain a private cause of action. In determining whether a statute bars enforcement of the Equal Protection Clause through §1983, as occurred in *Smith*, "comprehensive remedial scheme" refers to an elaborate system of rights and procedures, like that created by the EHA to enforce the equal protection rights of handicapped children, which demonstrates an intent to create an exclusive and superior method for enforcing a constitutional right. And in the instant case, the "comprehensive remedial scheme" appears to refer to the combination of a private right of action with the charge filing requirement of §626(d)(1),

more than what was sufficient in *Sea Clammers*, but far less than was required in *Smith*. A vague formula with three different meanings is not a legal standard which the lower courts could predictably administer in addressing whether to preclude a pre-existing remedy to enforce a constitutional right.

(2) Petitioners also assert that *Rancho Palos Verdes* creates a general rule, applicable to both lines of cases, that "the presence . . . 'of a more restrictive private remedy' alone establishes Congress' intent to displace a competing §1983 cause of action." (Pet. Br. 38, see also:15-16)(quoting *Rancho Palos Verdes*, 544 U.S. at 121). As petitioners use the phrase "competing cause of action," a § 1983 equal protection claim "compet[es]" with an ADEA cause of action, and thus would be governed by this rule. Thus, according to petitioners, the existence of "less comprehensive remedies under [a statute] than [are available] in a § 1983 suit . . . counsels for preclusion [of a § 1983 action to enforce a constitutional right]". (Pet. Br. 51)

However, the portion of *Rancho Palos Verdes* from which this passage is quoted clearly refers only to the question of whether a § 1983 cause of action could be used to enforce a statutory right, in addition to the private right of action provided by the statute itself. The existence of a "more restrictive" private right of action in a statute may support a conclusion that the rights in the statute itself may not also be enforced through § 1983. But under *Smith*, a demonstration that a statute precludes use of §1983 to enforce a constitutional right requires a showing that Congress believed the statute's remedial provisions would be the "most effective" method of enforcing that right than

a § 1983 action. 468 U.S. 992, 1013 (1984). The fact that the remedies provided under a statutory scheme are actually "more restrictive" than in a §1983 action would at least ordinarily be fatal to a suggestion that Congress adopted the statute for the purpose of providing a *better* remedy for the constitutional rights at stake. Petitioners' suggestion that a statutory scheme is likely to displace a § 1983 equal protection constitutional claim if the statutory scheme provides "less comprehensive" remedies stands the *Smith* standard on its head.

IV. THE ADEA DOES NOT PRECLUDE SECTION 1983 EQUAL PROTECTION ACTIONS

A. The ADEA Does Not Satisfy the *Smith* and *Fitzgerald* Preclusion Standard

To meet the standard established by *Smith* and *Fitzgerald*, petitioners must show that "Congress saw [the ADEA] as the sole means of vindicating the constitutional right to be free" from irrational age-based distinctions violative of the Equal Protection Clause. *Fitzgerald*, 555 U.S. at 256. Petitioners, however, do not even claim that "Congress intended that the [ADEA] be the exclusive avenue through which a plaintiff may assert those [constitutional] claims." *Smith*, 468 U.S. at 1009.

The Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), forecloses any possibility of meeting this standard. Judged against the backdrop of this Court's equal protection jurisprudence, it is clear that the ADEA cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. 528 U.S. at 86. "Congress never identified any pattern of age

discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." 528 U.S. at 89.

In addition, the prohibitions enacted by the ADEA have little correlation with potential constitutional violations. On the one hand, almost all the government employment practices that fall within the prohibitions of the ADEA are not constitutional violations. "The [ADEA] through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 528 U.S. at 86. To the extent that a few employment decisions that violate the ADEA might also happen to violate the Equal Protection Clause, that effect would be an entirely incidental effect of legislation not intended to address constitutional violations at all. On the other hand, the ADEA is limited in a manner that excludes many employees and possible constitutional claims. The ADEA, for example, does not forbid age-based discrimination against individuals under the age of 40, even though age-based equal protection violations could occur with regard to those workers. Discrimination (and thus even irrational actions) against government workers because of their youth is also outside the scope of the ADEA. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587 (2004). Given these exclusions, the purpose of the ADEA clearly was not to enforce the Equal Protection Clause.

Petitioners emphatically do not contend that the statutory scheme in the ADEA, like the rights and procedures in the EHA in *Smith*, was framed to create

a "more effective" remedy for unconstitutional age discrimination. To the contrary, petitioners repeatedly point out that the remedies in the ADEA are *less* effective than those available in a §1983 action. Petitioners stress, for example, that (under prevailing lower court decisions) a successful ADEA Plaintiff cannot obtain punitive damages or compensatory damages.

B. ADEA Is Not The Exclusive Remedy for Age Discrimination in Employment

Rather than attempting to argue that Congress intended the ADEA to be a method, indeed the exclusive method, for enforcing equal protection claims related to age discrimination in employment, petitioners advance a far more reaching claim, that Congress intended the ADEA to be the exclusive remedy for *all* claims of age discrimination in employment. (Pet. Br. 35)("Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA.") "Congress anticipated that the ADEA . . . would comprehensively regulate the field of age discrimination in employment." (*Id.* at 49).

Petitioners contend that this sweeping conclusion is required by one sentence in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) . Petitioners argue that *Preiser* establishes a general rule of statutory interpretation that a plaintiff cannot "avoid the requirements [of one statutory scheme] 'by the simple expedient of putting a different label on [his] pleadings.'" (Pet. Br. 34, 37)(*quoting Preiser*, 411 U.S. at 489-90). If the facts of a case are actionable under two federal laws, a plaintiff cannot "avoid" the remedial or procedural limitations imposed in one law merely by

"label[ing]" his claim to assert a violation of the other, more favorable provision. Differing causes of action under the various statutes applicable to a particular right present "competing claim[s]" (Pet. Br. 11-18), and only one cause of action can win that competition.

On this view *Preiser* creates a race to the bottom; if two or more federal provisions apply to a given claim, the provision with the most stringent "requirements" must be applied, and a plaintiff may not "avoid" those requirements by asserting claims under the other more favorable provisions. However, *Preiser* does not require this extraordinary result. In *Preiser*, the Court held that legal challenges to prison conditions (as distinct from attempts to obtain an inmate's release) could be brought *either* as a habeas corpus action (which is subject to an exhaustion requirement) or as a § 1983 action (thus "avoid[ing]" that requirement). *Preiser*, 411 U.S. at 499. It is a commonplace of civil litigation that a single set of facts may be actionable under several different federal (and possibly state) laws; often each count in a multi-count civil complaint "put[s] a different label" on each part of the pleadings.

Petitioners object that a plaintiff should not be able to "avoid" the lack of punitive damages under the ADEA by "label[ing] pleadings" as a request for relief in a §1983 equal protection action. However, it could be argued with equal cogency that a plaintiff should not be able to "avoid" the strictures of §1983, which severely limits governmental liability, by simply "label[ing] pleadings" as a claim under the ADEA, which imposes strict liability on public employers.

Where federal laws overlap, and thus both provide relief for a single set of facts, courts have no authority to characterize that situation as a "competition" and pick a winner. "There is some necessary overlap between Title VII and §1981, and where the statutes do in fact overlap, we are not at liberty 'to infer any positive preference for one over the other." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible." The intention of the legislature to repeal "must be clear and manifest."'" *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Where one set of facts violates several provisions of federal law, the differing procedures and remedies involved are ordinarily deemed complementary; federal judges are not authorized to hold a Hunger Games-like competition in which only one provision can survive.

Petitioners contend that established jurisprudence under the Fair Labor Standards Act demonstrates that the ADEA must be the exclusive remedy for age discrimination in employment. (Pet. Br. 25-27). According to petitioners, the lower courts agree "that the FLSA's exhaustive regime displaces other, competing causes of action—including state law contract, negligence, and fraud claims for failure to pay overtime, . . . [and] parallel state law claims." (Pet. Br. 26-27). On this view, the FLSA displaces any state or common law claim relating to a failure to pay overtime and at least some claims regarding failure to pay straight time wages. Because the ADEA incorporates the procedures and remedies of

the FLSA, petitioners reason, the ADEA also displaces all "competing causes of action."

However, the most obvious example of a state law claim "parallel" to the FLSA would be a claim under a state minimum wage law, such as the Illinois statute. *See* 820 ILCS 105/1 *et seq.* Assuredly the Attorney General of Illinois is not asking this Court to hold that the FLSA preempts that state law. Nor can petitioners be proposing that the ADEA "displaces" the "competing cause[] of action" provided by the Illinois statute forbidding age discrimination in employment, the Chicago and Cook County ordinances which contain similar prohibitions, or the guarantee of equal protection in Article 1, §2 of the Illinois State Constitution. Unsurprisingly, the lower court opinions relied on in petitioners' brief do not hold that the FLSA displaces all "parallel" state claims. Rather, those decisions make precisely the distinction explained above between *Sea Clammers* and *Smith*. The FLSA precludes the states and private parties from creating additional remedies for violations of the FLSA itself; the enforcement provisions contained in the FLSA are the only method by which an employee can obtain redress for a violation of that federal statute itself. But the states and parties are free to create other rights independent of the FLSA—such as a statutory or contractual entitlement to overtime pay—and to enforce those rights in any way they please. *Kendall v. City of Chesapeake, Va.*, 174 F.3d 437, 439 (4th Cir. 1999)("We hold that the elaborate remedial scheme provided in the FLSA demonstrates a congressional intent to prohibit § 1983 actions to enforce *such FLSA rights*.") (emphasis added); *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F.Supp. 1027, 1029 (N.D. Cal. 1972) (FLSA is the exclusive method of enforcing only regarding "whatever rights [a plaintiff] may have *under the FLSA*.")(emphasis added). (Pet.App.30a-31a)

C. This Court's Decisions Regarding Title VII Are Controlling Here

(1) Title VII and the ADEA are aspects of a single overall national policy to eradicate bias in the workplace.

> "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*. (disability);the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex)."

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995).

This Court has repeatedly held that Title VII[12] does not bar covered employees from bringing a §1983 action under the Equal Protection Clause regarding discrimination in employment on the basis of race, gender, or national origin. In a series of decisions over a period of

---

12. Senator Bentsen sponsored the amendment to the ADEA to protect state and local government employees in 1972 at the same time that Congress was considering extension of Title VII to those same government employees. In that year Senator Bentsen stated "I believe that the principles underlying these provisions in the EEOC bill [extending Title VII protection to government employees] are directly applicable to the Age Discrimination in Employment Act." 118 Cong.Rec. 15,895 (1972).

four decades, this Court has recognized that Title VII does not preclude § 1983 constitutional equal protection claims or claims under other federal anti-discrimination statutes. That well-established rule applies not only to state and local government workers, but also to employees of private employers, who may assert claims under § 1981.

Shortly before the ADEA was amended in 1974 to apply to state and local government employees, the Court addressed this issue in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *Alexander* held that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47, citing as examples of that congressional practice "42 U.S.C. §1981 (Civil Rights Act of 1866) [and] 42 U.S.C. §1983 (Civil Rights Act of 1871)." 415 U.S. at 47 n. 7. "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." 415 U.S. at 48. *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 459 (1975), reiterated that interpretation of Title VII. "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989), explained that under this well established body of law "[w]here conduct is covered by both §1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites." *See North Haven Bd. Of Ed. v. Bell*, 456 U.S. 512, 535 (1982)(Title VII and Title IX).

In *CBOCS v. Humphries*, 553 U.S. 442 (2008), the defendant expressed a concern similar to that advanced by petitioners, objecting that if § 1981 were interpreted to encompass retaliation claims, plaintiffs could skip the exhaustion requirements in Title VII, and obtain remedies outside of Title VII. This Court rejected that objection as inconsistent with the long-recognized intent of Congress to afford discrimination victims access to several overlapping remedies. 553 U.S. at 454-55.

Eleven circuits have long agreed that Title VII does not bar employment discrimination claims in § 1983 equal protection cases or actions under other federal statutes. *See Henley v. Brown*, 686 F.3d 634,642 (8th Cir. 2012), *cert. denied*, 133 S.Ct. 868 (2013). That rule has been a core principle of Title VII jurisprudence for decades, and a deeply entrenched part of the background of other legislation, including amendments to Title VII itself. Understandably, petitioners did not seek to dismiss Levin's gender equal protection constitutional claim as precluded by Title VII (R.16,36-37), and do not ask this Court to overrule *Alexander, Johnson, Patterson, Bell* or *CBOCS*.

(2) The national policy to prevent and correct age discrimination in employment, like the similar policy regarding discrimination on the basis of race, gender, national origin, religion and disability, involves a range of overlapping prohibitions and remedies. The ADEA is not the only federal statute forbidding age discrimination in employment; other federal laws[13] of narrower scope,

---

13. 5 USC §§2302(b)(1)(B) , 7116(b)(4); 22 U.S.C. §§ 3905(b)(1), 4115(b)(4); 26 U.S.C. § 7471(a)(6)(A). Two federal laws forbid

contain such a prohibition. In addition, forty-nine states have their own statutes forbidding age discrimination in employment. *See* Amici Brief State of Michigan and 20 Other States, *et al.*, pp.14-23. State or local laws do not require that employees file charges with the EEOC. In addition, state constitutions (including in Illinois) contain guarantees of equal protection of the laws, which often are construed in light of the prevailing federal interpretation of the Equal Protection Clause in the Fourteenth Amendment, and in some, if not most, instances would be interpreted to forbid age discrimination. Petitioners do not contend that Congress in adopting the ADEA precluded enforcement of any of these divergent state and local laws, which could also be supplemental claims in federal court. Thus, it is counterintuitive to believe that Congress chose "silence" as the means to express an intention to preclude use of § 1983 to enforce the Equal Protection Clause of the Fourteenth Amendment.

(3) Petitioners argue that the ADEA should be construed to preclude § 1983 age-based equal protection claims in order to prevent employees from bringing suit under § 1983 without first filing a notice of intent to sue under §626(d)(1) of the ADEA. (Pet. Br. 20-24). Such

---

age discrimination in employment by certain employers. 12 U.S.C. § 3106a; 47 U.S.C. § 554. Four statutes expressly prohibit such discrimination by certain recipients of federal funds and certain grant recipients. 15 U.S.C. § 3151(a); 42 U.S.C. §§5057(a)(1), 12635(a)(1); 49 U.S.C. § 5332(b); The Age Discrimination Act of 1975; 42 U.S.C.§6101, 45 CFR 90 and 91, contain a general prohibition against age discrimination by recipients of federal funds permitting injunctive relief for age discrimination claims against schools receiving federal assistance. *See Long v. Fulton County Sch. Dist.*, 807 F. Supp. 2d 1274, 1284 (N.D.GA.2011).

§ 1983 suits, petitioners insist, would undermine and evade the conciliation process established by the ADEA. But that objection would extend to Title VII.

This line of reasoning, if adopted by the Court with regard to the ADEA, would be even more compelling in the context of Title VII, because potential Title VII plaintiffs are much more likely to disregard their statutory claims. As petitioners point out, employees asserting age discrimination claims have a far better chance of succeeding on the merits if they proceed under the ADEA than if they file suit instead under the Equal Protection Clause. (Pet. Br. 44, *see also*: 10, 20, 34, 38, 47). The consequent *disincentive* for age-discrimination plaintiffs to spurn potential ADEA claims is illustrated by actual experience. "[T]he vast majority of government workers who assert age discrimination claims will choose to rely on ADEA...they simply have a much better chance of winning." *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1376 (4th Cir. 1989)(Murnaghan, J., dissenting).

Mr. Levin did file a complaint with EEOC and a state agency and received a right to sue notice, and added a § 1983 claim to his complaint only after defendants asserted in the district court that the ADEA excluded Levin from its protections. The sole reason that petitioners can suggest for an employee to file suit without first filing the 60-day advance notice needed to preserve an ADEA claim is that a plaintiff might be "impatient." (Pet. Br. 35). But no prudent individual would abandon an ADEA claim on that ground.

On the other hand, employees alleging discrimination on the basis of race, gender, color, national origin and

religion would have a far greater incentive to proceed directly with a § 1983 equal protection claim, rather than filing a Title VII charge. For a plaintiff alleging intentional discrimination on those grounds, the standard of proof under Title VII (unlike the ADEA) is not more favorable than under the Equal Protection Clause. *Zombro*, 868 F.2d at 1376 (Murnaghan, J., dissenting).

Petitioners also object that employees able to maintain a § 1983 equal protection action could obtain remedies not available under the ADEA such as punitive damages.[14] But punitive damages are a normal part of judicial remedies, and were available in Section 1983 race and sex discrimination cases when they were not authorized by Title VII. Deterrence of future egregious conduct is the primary purpose of § 1983 and punitive damages, which directly advance the public's interest in preventing constitutional deprivations. This Court found a damages remedy against the wrongdoer a more effective deterrent than damages against an employer. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

Petitioners object that if plaintiffs can bring §1983 equal protection claims alleging age discrimination, defendants will be subject to burdensome discovery. (Pet.

---

14. The text of the ADEA does not bar punitive or compensatory damages. Although the phrase "legal . . . relief" in §626(b) has been construed by the lower courts to exclude such damages, those lower court decisions occurred only after the 1974 amendment to the ADEA extended coverage to state and local government employees. *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107, 110 (1st Cir. 1978). However, post-1974 developments shed no light on the intent of Congress in 1974, when it applied the ADEA to public employment. *See Fitzgerald*, 555 U.S. at 256.

Br. 34, 41-44). However, in §1983 actions the defense of qualified immunity often protects public officials from such a burden. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). Discovery is not significantly different in ADEA or Title VII cases.

Petitioners assert that this Court's decisions regarding Title VII are distinguishable, because "the remedial provisions of the ADEA, which are the 'focus' of any preclusion analysis, 'differ from those of Title VII.'" (Pet. Reply 9). Section 626(b) of the ADEA provides that the ADEA is to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act. Petitioners argue that this Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), "stressed the 'significant differences' between the [FLSA and Title VII] in terms of their 'remedial and procedural provisions.'" (Pet.Reply 10)(quoting *Lorillard*, 434 U.S. at 584). *Lorillard*, petitioners assert, "list[ed] many differences between [those] laws' remedial schemes." (Pet. Reply 10).

However, only some of the remedial provisions applicable to the ADEA are incorporated by reference from the FLSA. The particular remedial provisions of the ADEA and the FLSA of concern to this Court in *Lorillard* are entirely different from the aspects of the ADEA on which petitioners rely on herein.[15] Petitioners

15. The differences relied on by *Lorillard* between Title VII and the ADEA (including provisions incorporated from the FLSA) were the provision for legal relief in the ADEA but not Title VII, the fact that back pay is mandatory under the FLSA but only permissive under Title VII, and the practice of trying FLSA (but not Title VII) cases before juries. 434 U.S. at 584-85. Petitioners do not suggest that any of those aspects of the ADEA remedies and procedures are relevant to the issues in this case.

place particular reliance on the requirement in § 626(d)(1) that an employee, prior to filing suit, file an EEOC charge, and the provisions in §626(b) and §626(d)(1) for conciliation. But none of those provisions derive from or is found in the FLSA. The requirement in §§ 626(b) and 626(d)(1) of federal efforts "to eliminate" any unlawful practice "through informal methods of conciliation, conference, and persuasion" are lifted, verbatim, from § 706(b) of Title VII. 42 U.S.C. § 2000e-5(b). The FLSA does not require that workers file any charge with the Secretary of Labor prior to filing suit; that requirement in § 626(d)(1) of the ADEA evidently was based on the creation of such a requirement several years earlier in Title VII. Section 626(d)(1) establishes three deadlines for an ADEA charge: 180 days after the event; 300 days in state with an anti-discrimination law, or within 30 days notice of the termination of a state proceeding. These are the identical deadlines earlier provided in §706(e) of Title VII, and much of the same wording is the same. 42 U.S.C. § 2000e-5(e). Petitioners also rely on the fact that the lower courts have held that punitive damages are not available under the ADEA; but that rule, which emerged after the 1974 amendments to the ADEA, is based on an interpretation of the phrase "legal . . . relief" in §626(b), not on the FLSA.

Petitioners also argue that the sole basis of the established interpretation of Title VII is a statement in a 1972 committee report regarding the Title VII amendments of that year that "ma[d]e clear that Congress intended to preserve state and municipal employees' right to advance constitutional claims." (Pet. Reply. 10). Petitioners stress that this language in the 1972 House report is not contained in any of the reports regarding

the 1974 amendments to the ADEA. *Id.* This analysis greatly understates the nature and significance of the events surrounding the 1972 amendments to Title VII. The committee report accurately described the effect of the legislation reported by the Committee itself, but a majority of the House initially voted *not* to preserve those rights, instead adopting an amendment to the legislation that made Title VII the exclusive remedy. The Senate disagreed, stripping the House limitation from the bill, and restoring the system of overlapping remedies that continues to this day.

V. GERA DOES NOT PRECLUDE SECTION 1983 EQUAL PROTECTION ACTIONS

Petitioners contend that Levin's section 1983 claim is precluded by GERA. But that argument was never advanced in the courts below and has been waived; that issue is also outside the scope of the question presented. Preliminary to deciding whether GERA precludes Levin's section 1983 equal protection claim, the Court would first have to determine whether GERA applies to Levin at all. There is some dispute as to whether GERA covers state employees[16]; because petitioners never relied on GERA in the courts below, those courts had no occasion to address this threshold issue.

GERA, now codified at 42 U.S.C. §§ 2000e-16a to 2000e-16c, is what remains of a considerably longer statute enacted in 1991. Section 2000e-16c(a) defines the

---

16. *See Alaska v. EEOC*, 564 F. 3d 1062, 1083-1087 (Ikuta J., dissenting)(9th Cir. 2009)(en banc), *cert. denied*, 558 U.S. 1111 (2010).

employees covered by GERA in terms that are identical to the exclusions in the ADEA, Title VII, and the ADA, except that elected officials are not within the scope of GERA. Section 2000e-16b(a) directs that

> [a]ll personnel actions affecting [the covered employees] . . . shall be free from any discrimination based on –
>
> > (1) race, color, religion, sex, or national origin, with the meaning of section 2000e-16 of this Title;
> >
> > (2) age, within the meaning of section 633a of Title 29; or
> >
> > (3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of this Title.

Section 2000e-16c(b) provides that a covered employee may file a complaint with the EEOC within 180 days after the occurrence of an alleged violation. GERA does not establish any administrative procedures for adjudicating such complaints, but contemplates that the EEOC will do so. 29 C.F.R. §§ 1603.100, *et seq.* If the EEOC determines that a section 2000e-16b(a) violation occurred, it is to order appropriate relief. For a violation of the section 2000e-16b(a)(2) prohibition against age discrimination, the remedies may include the remedies that could be awarded under section 633a(c) of the ADEA. 42 U.S.C. § 2000e-16b(b)(2).

Petitioners contend that GERA precludes a covered employee from bringing a section 1983 constitutional equal protection action alleging age-based discrimination.[17] But here, as with the ADEA itself, this Court's decisions regarding race and gender discrimination are an insurmountable obstacle. In the cases described above, this Court recognized the longstanding national policy of providing independent overlapping remedies for such discrimination. That policy is reflected in the 1991 Civil Rights Act itself, of which GERA was a part. That 1991 Act strengthened Title VII as well as section1981, both of which apply to racial discrimination in employment, reflecting the understanding of Congress that the types of discrimination forbidden by Title VII are also addressed independently by other federal provisions. See *Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1231 (11th Cir. 1998)("it would be perverse to conclude that Congress [in the Civil Rights Act of 1991] provided additional remedies and simultaneously intended silently to extinguish the remedy that § 1983 provided for many years"). GERA does not preclude applicant for policy-making position, excluded from Title VII, from maintaining race discrimination claim under 42 U.S.C. §§ 1981 and 1983. *See Stubblefield v. City of Jackson*, 871 F.Supp. 903, 910 (S.D.Miss. 1994) ("[j]ust as Title VII is not the exclusive avenue of redress for a violation of one's right to be free from unlawful discrimination based on race, neither is the Government Employee Rights Act the exclusive remedy.")

---

17. This case does not present the question of whether a section 1983 action could be maintained to enforce the substantive rights of GERA in section 2000e-16b(a).

Petitioners do not appear to contend that GERA bars claims of discrimination based on any of the grounds forbidden by Title VII, such as claims under section 1981, Title VI, or the Equal Protection Clause. But if Congress did not intend GERA to bar enforcement of a covered worker's rights under the Equal Protection Clause (or under other federal statutes) to be free from discrimination on the basis of race or gender, it is difficult to understand how petitioners could show that Congress nonetheless intended GERA to bar enforcement of that worker's right under the Equal Protection Clause to be free from irrational age-based discrimination. The prohibitions against race and gender are set out in the same sentence in section 2000e-16b(a) as the prohibition against age discrimination, and all of those prohibitions are enforced under the terms of section 2000e-16c(b).

Petitioners suggest that the treatment of age claims under GERA may be distinguished from race and gender claims because in 1991, when GERA was enacted, the Fourth Circuit had decided in *Zombro* that the ADEA precludes section 1983 actions. (Pet. Br. 32). But the isolated and sharply divided appellate opinion in that case assuredly would have not convinced Congress that the view of a two judge majority was the settled construction of the ADEA. The First Circuit in 1990 had declined to decide the issue[18], and prior to 1991 both this Court[19] and the circuit courts[20] had entertained and determined on

---

18. *Izquieerdo Prieto v. Mercado Rosa*, 894 F.2d 467, 470 (1st Cir. 1990).

19. *Vance v. Bradley*, 440 U.S. 93, 99 (1979).

20. *E.g., Alford v. City of Lubbock*, 664 F.2d 1263, 1266 (5th Cir. 1982); *Gault v. Garrison*, 569 F.2d 993, 997 (7th Cir. 1977), *cert. denied*, 440 U.S. 945 (1979).

the merits equal protection challenges to practices also covered by the ADEA.

GERA provides a procedure for enforcing the anti-discrimination provisions of section 2000e-16b(a). Petitioners do not contend that GERA, like the EHA in *Smith*, was intended to provide a method of enforcing rights in the Constitution, least of all the exclusive method for doing so. Section 2000e-16a(b) states that the purpose of GERA "is to provide procedures"—not "to provide *the* procedures"—to protect covered employees from discrimination. Like the ADEA, GERA was not enacted as a remedy for constitutional violations, and both its substantive standards and its coverage are substantially different from the protections of the Equal Protection Clause. As such, for many of the very same reasons applicable to the ADEA, the contours, rights, and protections of § 1983 equal protection actions and those limited rights in GERA diverge in such significant ways, which makes clear that Congress could not have intended GERA to replace §1983 as the "sole" and "exclusive" remedy to enforce the prohibition of the Equal Protection Clause against gender, race, religion, age, color, and national origin discrimination.

Petitioners have not met their burden to prove that the text, legislative history and remedies of GERA were intended by Congress to be the "exclusive" remedy for workers to enforce the Equal Protection Clause. GERA cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86 (2000).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed. In the alternative, the petition should be dismissed as improvidently granted.

Respectfully submitted,

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

EDWARD THEOBALD
Counsel of Record
135 S. LaSalle Street
Suite 1920
Chicago, IL 60603
(312) 346-9246
Bears51@aol.com

HARVEY N. LEVIN
1501 West Oakdale
Chicago, IL 60657

Counsel for Respondent

REPLY BRIEF

No. 12-872

In the Supreme Court of the United States

LISA MADIGAN, in her individual capacity, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,
PETITIONERS,

v.

HARVEY LEVIN,
RESPONDENT.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
CLIFFORD W. BERLOW
MATTHEW P. BECKER
Ass't Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

I. This Case Falls Squarely Within The Question Presented. 1

II. Respondent's Proposed Test Is Illogical And Irreconcilable With This Court's Precedent. ... 5

A. This Court Consistently Applies A Single Test Focused On The Statute's Remedial Regime. 5

B. Respondent's Proposed Rule For Displacing § 1983 As A Remedy For Constitutional Claims Is Unworkable. 9

III. Respondent May Not Ask The Court To Ignore Parts Of The ADEA's Remedial Regime. 16

A. It Is Irrelevant That The ADEA Has Some Remedial Elements In Common With Title VII. 16

B. Respondent's Approach To GERA Is Unsound Legally And Impossible To Follow In Practice. 20

TABLE OF CONTENTS–Continued

IV. There Is No Reason To Vacate The Seventh Circuit's Decision On Prudential Grounds. . . . 23

CONCLUSION. 25

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ashcroft v. Iqbal, 556 U.S. 662 (2009).. . . . . 11, 24

Baker v. McCollan, 443 U.S. 137 (1979). 8

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007). 11

Blessing v. Freestone,
520 U.S. 329 (1997). 6, 10

Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). 10

Camreta v. Greene, 131 S. Ct. 2020 (2011). 24

C.I.R. v. Schleier,
515 U.S. 323 (1995). 18

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005). 6, 8, 15

Davis v. Passman, 442 U.S. 228 (1979). 13, 14

Day v. Wayne Cnty. Bd. of Auditors,
749 F.2d 1199 (6th Cir. 1984).. 17

Dellmuth v. Muth, 491 U.S. 223 (1989). 15, 16

Fitzgerald v. Barnstable Sch. Comm.,
555 U.S. 246 (2009). 6, 7, 11, 12

TABLE OF AUTHORITIES—Continued

Franklin v. Gwinnett Cnty. Pub. Schs.,
503 U.S. 60 (1992) 21

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 13

Great Am. Fed. Sav. & Loan Ass'n v. Novotny,
442 U.S. 366 (1979) 7

Hartman v. Moore, 547 U.S. 250 (2006) 24

Heck v. Humphrey, 512 U.S. 477 (1994) 14

Karna v. BP Corp. N. Am., Inc.,
2013 WL 1155485 (S.D. Tex. Mar. 19, 2013) . . . 19

Keller v. Prince George's Cnty.,
827 F.2d 952 (4th Cir. 1987) 17, 18

Kendall v. City of Chesapeake,
174 F.3d 437 (4th Cir. 1999) 19

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 10, 11, 12, 15

Knowles v. Iowa, 525 U.S. 113 (1998) 3

Latoski v. James,
66 F.3d 751 (5th Cir. 1995) 17, 18

TABLE OF AUTHORITIES—Continued

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995). 4

Lorillard v. Pons, 434 U.S. 575 (1978). 19

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). 5-6, 8

Morton v. Mancari, 417 U.S. 535 (1974). 8

Moses H. Cone Mem'l Hosp. v. Mercury Constr.,
460 U.S. 1 (1983). 2

Patterson v. McLean Credit Union,
491 U.S. 164 (1989). 8

Preiser v. Rodriguez,
411 U.S. 475 (1973). 10

Rivera v. P.R. Aqueduct & Sewers Auth.,
331 F.3d 183 (1st Cir. 2003). 18

Roberts v. Coll. of the Desert,
870 F.2d 1411 (9th Cir. 1988). 18

Robertson v. Seattle Audubon Soc'y,
503 U.S. 429 (1992). 21

Smith v. Robinson, 468 U.S. 992 (1984),
superceded by statute, PL 99-372,
100 Stat. 796 (1986). . . . . *passim*

TABLE OF AUTHORITIES—Continued

Starrett v. Wadley,
876 F.2d 808 (10th Cir. 1989)..... 18

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002)..... 11

Swint v. Chambers Cnty. Comm'n,
514 U.S. 35 (1995)..... 24

Teneyuca v. Bexar Cnty.,
767 F.2d 148 (5th Cir. 1985)..... 22

Torre v. Barry,
661 F.2d 1371 (D.C. Cir. 1981)..... 17, 18

Trigg v. Fort Wayne Cmty. Schs.,
766 F.2d 299 (7th Cir. 1985)..... 17

Walker v. Serv. Corp. Int'l,
2011 WL 1370575 (W.D. Va. Apr. 12, 2011)... 19

Wilder v. Va. Hosp. Assoc., 496 U.S. 498 (1990)..... 6

Wilkie v. Robbins, 551 U.S. 537 (2007)..... 23, 24

Wright v. Roanoke Redev. & Housing Auth.,
479 U.S. 418 (1987)..... 6

TABLE OF AUTHORITIES—Continued

Statutes, Regulation, and Rules:

28 U.S.C. § 2254 10

29 U.S.C. § 216 19

29 U.S.C. § 217 19

29 U.S.C. § 626 19

29 U.S.C. § 630(f) 1, 20, 22

29 U.S.C. § 633a 21

42 U.S.C. § 1983 . . . . . *passim*

42 U.S.C. § 2000d-7 21

42 U.S.C. § 2000e-16b 21

42 U.S.C. § 2000e-16c 20

42 U.S.C. § 2000ff-6(b) 22

Pub. L. 110-233 21

29 C.F.R. § 1602(e) 21

S. Ct. R. 15.2 2

Fed. R. Civ. P. 54(b) 2

TABLE OF AUTHORITIES—Continued

Other:

Opp v. Office of the State's Attorney of Cook Cnty., Cert. Pet'n, 2011 WL 1090104 (U.S. 10-1163) 2

H.R. Rep. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137. 17

REPLY BRIEF FOR PETITIONERS

I. This Case Falls Squarely Within The Question Presented.

Respondent claims that the question presented applies only to "employees" under the ADEA, and that the district court's interlocutory determination that he is an "appointee" (one of a class of high-level public officials that 29 U.S.C. § 630(f) exempts from the ADEA's definition of "employee") therefore takes this case outside the scope of the question. Resp. Br. 8-15. Respondent's logic fails at every step.

1. His claim is doomed at the threshold, for this Court was aware of the district court's interlocutory determination when certiorari was granted. The district court's ruling was clear from the certiorari petition (at p. 16), respondent's brief in opposition (at p. 3), the Seventh Circuit's decision (Pet. App. 6a), and the district court opinion (Pet. App. 68a). And while respondent tries to suggest that something has changed—"petitioners now acknowledge that Levin is *not* covered by the ADEA," Resp. Br. 9 (emphasis in original)—that is untrue. Petitioners' opening brief merely notes, just as their certiorari petition did, that the district court's most recent decision finds respondent to be an appointee. Pet. Br. 5, 37; Pet'n 16 (citing district court opinion at Pet. App. 68a).

2. Moreover, respondent raised no objection to the question presented in his brief in opposition. He instead defended the merits of the Seventh Circuit's decision, claiming that review is unwarranted because the "answer to the 'question presented' is found in two

Supreme Court decisions." BIO 5. To avoid waiver, respondent was required to raise any non-jurisdictional "objection to consideration of [the] question presented based on what occurred in the proceedings below." S. Ct. R. 15.2. This he failed to do.

Indeed, the waiver rule should have special force here, where the theory underlying respondent's current objection to the question presented is inconsistent with his legal argument below. Respondent claims that, because the district court determined that he is an appointee rather than an employee, he will not be subject to whatever rule this Court announces for the displacement of an employee's § 1983 claims. But respondent's complaint alleges that he is an "employee," Doc. 16, ¶ 6, and he has never conceded that the district court's contrary, non-final ruling is ultimately correct or controlling. Even now, he remains free to ask the district court to revisit the issue, raise it on appeal from a final judgment, or make it the subject of a certiorari petition. Fed. R. Civ. P. 54(b); *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 13 (1983); see also *Opp v. Office of the State's Attorney of Cook Cnty.*, Cert. Pet'n, 2011 WL 1090104, at *2 (U.S. 10-1163) (challenging Seventh Circuit's "uniquely broad interpretation of [the 'policymaker'] exclusion" as "far more expansive[] than the avowedly narrow construction in other circuits").

Respondent never argued below that he is an appointee, much less that his § 1983 claim survives even if an employee's would not. Instead, he urged the Seventh Circuit to rule just as it did—to reject the view of other circuits and hold broadly that the ADEA does

not displace § 1983 remedies for constitutional claims. Pl's CA7 Br. 1, 15, 22-51. Having sought and obtained that holding, respondent may not immunize it from review with a newfound legal theory and accompanying, unpreserved quarrel with the question presented. Rule 15.2 precludes respondent from benefitting from such an approach. See, *e.g.*, *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998) (rejecting belated objection to certiorari review as waved).

3. Finally, waiver aside—and in line with this Court's decision to grant the certiorari petition notwithstanding the district court's interlocutory order—it is immaterial to the question presented whether respondent's complaint controls the displacement analysis (and he is therefore an employee), or whether the district court's current determination controls (and he is an appointee).

First, if the ADEA displaces § 1983 equal protection claims by employees, as petitioners contend, then it also does so for the appointees and other high-level public officials that § 630(f) exempts. The ADEA's carve-out for these officials showed Congress' determination that elected officials needed "'complete freedom'" when making personnel decisions involving sensitive public posts. Pet. Br. 27-28, 29. It would have undermined that determination to permit those who serve in these posts to bring claims under § 1983 instead. See *infra* p. 13. Whether a plaintiff is an employee or an appointee, that plaintiff "avoid[s] the [ADEA's] comprehensive remedial regime"—in the words of the question presented—by proceeding under § 1983.

Second, with the passage of GERA in 1991, those once-exempt officials are now entitled to the ADEA's rights and remedies, Pet. Br. 30, making any distinction between employees and appointees even more patently irrelevant in resolving the question presented.

Perhaps recognizing that GERA solves the vehicle problem respondent belatedly seeks to introduce, he asks the Court to ignore that statute on the theory that it presents a new question—whether GERA, rather than the ADEA, displaces his § 1983 remedy. Resp. Br. 5, 10-11. But this mischaracterizes both petitioners' argument and GERA. Petitioners do not contend that GERA has any independent ability to displace § 1983 remedies. Petitioners raise GERA in response to the Seventh Circuit's concern that the ADEA "exempts claims by * * * elected officials and certain members of their staff" as well as "appointees." Pet. App. 33a; see generally *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to precise arguments they made below.") (internal quotations omitted). GERA shows that the district court's concerns were unfounded, for ADEA rights and remedies extend to the once-exempt, high-level officials (except elected officials themselves). Pet. Br. 30. At the same time, GERA adds to the ADEA's comprehensive remedial regime, and GERA's history provides additional insight into congressional intent. Pet. Br. 30, 32-33.

These points do not depend on whether respondent is an "employee" or an "appointee." And—although neither party discussed GERA below, for respondent has

consistently declined to invoke its procedures as an "appointee"— GERA is part and parcel of the ADEA's "remedial regime," see *infra* Section III.B, and the question presented asks whether plaintiffs may avoid that regime by pursuing remedies for an equal protection violation under § 1983.

For these reasons, respondent's newfound dispute with the question presented is waived and meritless.

II. Respondent's Proposed Test Is Illogical And Irreconcilable With This Court's Precedent.

As petitioners showed in their opening brief (at pp. 11-19), this Court has consistently relied on the existence of a comprehensive remedial regime to conclude that a statute displaces competing remedies under § 1983, whether for the violation of the statute itself or a corresponding constitutional right. Respondent cannot explain away this language in the Court's prior decisions, and his proposed, alternative rule lacks support in either precedent or common sense.

A. This Court Consistently Applies A Single Test Focused On The Statute's Remedial Regime.

1. Although respondent contends that the displacement of § 1983 remedies presents "two distinct legal questions," depending on whether the underlying rights are statutory or constitutional, Resp. Br. 20, in fact this Court has consistently analyzed displacement claims using a single standard focused on the comprehensiveness of a statute's remedial regime, Pet. Br. 11-19. This was true in both *Middlesex County*

Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) (which displaced § 1983 remedies for statutory violations), and *Smith v. Robinson*, 468 U.S. 992 (1984) (which relied on *Sea Clammers* to displace § 1983 remedies for constitutional violations). See *Sea Clammers*, 453 U.S. at 20 ("[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"); *Smith*, 468 U.S. at 1011-1012 (citing "comprehensive nature of the procedures and guarantees set out in the" Education of the Handicapped Act).

This Court's subsequent decisions refer to *Sea Clammers* and *Smith* in the same breath and for that same standard. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005); *Blessing v. Freestone*, 520 U.S. 329, 347-348 (1997); *Wilder v. Va. Hosp. Assoc.*, 496 U.S. 498, 521 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989); *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423, 424, 427 (1987). Most recently, in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), the Court again recognized that, "[a]s in *Sea Clammers*, * * * this Court [in *Smith*] focused on the statute's detailed remedial scheme in concluding that Congress intended the [statute there] to provide the sole avenue for relief." 555 U.S. at 253-254. And *Fitzgerald* reaffirmed that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983," the Court has "placed

primary emphasis on the nature and extent of that statute's remedial scheme." *Id.* at 253.

Respondent misreads *Smith* and *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). Resp. Br. 22. He is correct that *Smith* devoted a footnote to whether EHA rights could be vindicated through § 1983. 468 U.S. at 1009 n.11. But the Court treated this issue separately, and briefly, because in that case the plaintiffs' "§ 1983 claims *were not based on alleged violations of the EHA*, but on independent claims of constitutional deprivations." *Id.* at 1008-1009 (emphasis added). The Court simply had no reason to examine the statutory displacement question. *Novotny*, meanwhile, did not involve displacement of a § 1983 action at all. The question there was whether Title VII rights could be asserted within § 1985(3)'s remedial framework. 442 U.S. at 377-378.

2. Conceding that this Court relies on remedial comprehensiveness in its displacement decisions, Resp. Br. 32-33, respondent contends that the phrase "comprehensive remedial regime" is a "vague formula" and accuses the Court of assigning that term "different meanings" in different contexts. Resp. Br. 33-34. To be sure, whether a regime is comprehensive may be a matter of degree, but the term's meaning does not change depending on the context, for the reason the Court relies on this standard is the same regardless of whether the competing § 1983 remedy is for a statutory or constitutional violation. Either way, courts fairly assume that Congress would not intend parties to use the general, § 1983 remedy to circumvent a remedial

scheme carefully crafted to advance a specific legal right. See *Rancho Palos Verdes*, 544 U.S. at 122-123; *Smith*, 468 U.S. at 1011-1012; *Sea Clammers*, 453 U.S. at 20. A comprehensive regime—one that is incompatible with more general, § 1983 remedies—is the best evidence of Congress' intent to displace the latter in a specific universe of cases.

Nor is this inconsistent with the idea, Resp. Br. 37-39, that Congress may create overlapping remedies, by making this interest known either "express[ly] or implicit[ly]." *Rancho Palos Verdes*, 544 U.S. at 122. And of course Congress may create multiple substantive rights in the same area. But § 1983 is not a substantive provision. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). It provides a general remedy for federal constitutional and statutory violations, and the presumption against implied repeal therefore does not apply. See *Rancho Palos Verdes*, 544 U.S. at 120 n.2. Accordingly, respondent's reliance on that presumption (at pp. 28-29) is misplaced, as is his repeated reliance on the coexistence of multiple *substantive* rights, see Resp. Br. 39 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (involving interplay between Title VII and § 1981), and *Morton v. Mancari*, 417 U.S. 535 (1974) (involving interplay between Equal Employment Opportunity Act of 1972 and Indian Reorganization Act of 1934)); see also Resp. Br. 42-43.

B. Respondent's Proposed Rule For Displacing § 1983 As A Remedy For Constitutional Claims Is Unworkable.

Not only is respondent wrong to claim that this Court has created two different tests for displacing § 1983 as a remedy for statutory and constitutional violations, but the test he proposes for the latter class of cases is not viable. Respondent initially asks whether "the statutory scheme was created for the purpose of enforcing [the corresponding] constitutional right" and whether "Congress intended that scheme to be the exclusive method of enforcing that constitutional right." Resp. Br. 7. Respondent then reduces that standard to practice by requiring, variously—and in addition to a comprehensive remedial regime—that Congress include a "reference to equal protection or [another] constitutional right" in "[t]he text" of the statute; that there be near-perfect overlap between the protections of the constitutional right and the new statutory right; and that the statutory remedies be the "most effective" available, by which respondent means they may not be more limited in any way than the remedies offered by § 1983. Resp. Br. 25, 27, 32, 36-37. Each of these criteria is fatally flawed.

1. Respondent's proposed requirement that Congress refer expressly on a statute's face to any constitutional claim it intends to displace disregards the established rule that Congress may "foreclose[]" a § 1983 remedy either "expressly" ("in the statute itself") *or* "impliedly, by creating a comprehensive enforcement scheme that is incompatible with

individual enforcement under § 1983." *Blessing*, 520 U.S. at 341 (internal quotations omitted).

Nor is there support for respondent's express-statement rule in *Smith* and *Preiser v. Rodriguez*, 411 U.S. 475 (1973), as he contends (at p. 24 & n.7). With the EHA in *Smith*, Congress sought to "incorporate[] the major principles" of two then-recently decided district court decisions recognizing a constitutional right to education. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 194 (1982) (internal quotations omitted). Because these cases were "the impetus for the Act," *id.* at 192, Congress naturally made its intent to protect schoolchildren's constitutional rights express. The Court's displacement finding in *Smith* did not hinge on this statutory language, however, but rather on the EHA's comprehensive remedial regime and the absence of legislative history showing any congressional intent to allow plaintiffs to circumvent that regime. Pet. Br. 46. Nor is it surprising that Congress referenced constitutional violations on the face of 28 U.S.C. § 2254, for habeas corpus exists historically to secure discharge from confinement that is "contrary to the Constitution or fundamental law." *Preiser*, 411 U.S. at 485. And the Court did not rely on this textual reference as a basis for its decision in *Preiser*, either.

Moreover, an express-statement rule would make little sense in cases, like this one, where Congress has supplanted a narrow, difficult-to-vindicate constitutional right with one that imposes "substantially higher burdens on state employers." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 87 (2000); see

also *id.* at 87 (ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard").* It is unreasonable to expect Congress to refer expressly to an analogous constitutional right where, as here, Congress' intent was not merely to protect that right by statute, but to create protections running well "beyond the requirements of the Equal Protection Clause." *Id.* at 88.

2. Respondent's near-perfect overlap requirement likewise fails. To be sure, *Fitzgerald* includes a comparison between equal protection and Title IX rights, but the Court was clear that this discussion merely "len[t] further support" to its holding. 555 U.S. at 256; see Pet. Br. 18, 46-47. In any event, *Fitzgerald* does not purport to limit displacement of § 1983 remedies to cases where a statute protects *no more* than does a preexisting, constitutional right, as respondent urges (at p. 36). Gender-bias claims trigger heightened

---

*Although there is no dispute that equal protection claims for age discrimination are rarely successful, *e.g.*, AARP Br. 28; Nat'l Educ. Ass'n Br. 16, the argument that these claims do not impose substantial discovery and settlement costs on public employers, *e.g.*, Nat'l Educ. Ass'n Br. 22-23, misunderstands applicable law. See Pet. Br. 41-42 (explaining that liberal pleading standard for employment discrimination claims set forth in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), survived *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

constitutional scrutiny, and the Court in *Fitzgerald* was unwilling to "lightly conclude" that Congress meant to displace remedies for such "substantial equal protection claim[s]." 555 U.S. at 256 (internal quotations omitted); see also Pet. Br. 46-48. It was therefore significant that Title IX left many of these rights unprotected. See 555 U.S. at 256-257. And although the Court also observed some ways in which Title IX rights were more protective, see *ibid.*, the Court did not purport to announce a rule barring the implied displacement of § 1983 remedies where, as here, the constitutional right is narrowly circumscribed and the statute not only protects that right but also goes much further. Such a case was not before the Court. And there is no reason to suppose that Congress is any less committed to displacing inconsistent remedies when it protects constitutional rights as part of a broad measure with a panoply of protections, than when it passes a law that narrowly codifies a constitutional right. This is particularly so where, unlike in *Fitzgerald*, the statute also offers a "comprehensive remedial scheme comparable to those at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*." *Id.* at 258.

In short, if *Fitzgerald* adds anything to the "comprehensive remedial regime" standard, but see Pet. Br. 46-47, it is simply that courts may also consider the extent to which a statute leaves "substantial" constitutional rights unprotected. The ADEA does no such thing, for it covers "substantially more" than the Equal Protection Clause. *Kimel*, 528 U.S. at 86. Respondent cites employees under forty and victims of reverse age discrimination as examples of workers

whom the ADEA fails to protect (at pp. 18, 36), but these employees are not subject to the discrimination against relatively older workers that the ADEA was enacted to prevent. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591, 593 (2004) ("Congress * * * ignored everyone under 40" and left the "complaints of the relatively young outside the statutory concern."). Accordingly, nothing in the ADEA suggests that Congress sought to displace constitutional claims for these employees.

In contrast, Congress focused specifically on high-ranking government officials and made the considered judgment, initially, that effective governance precluded these employees from bringing federal age discrimination claims. Pet. Br. 27-30, 48-49. Later, with GERA, Congress again focused on these officials, this time deciding that their federal age claims would not be incompatible with effective government if those claims were adjudicated through a specially designed administrative process. Pet. Br. 30-32. Such targeted exemptions—for conduct that otherwise falls within the discrimination that Congress targeted with the ADEA—suggest that Congress would not want these same employees to bring age-bias claims under § 1983.

Davis v. Passman, 442 U.S. 228 (1979), *Smith*, and *Preiser* are not to the contrary, as respondent contends (at pp. 16-18). *Davis* raised no displacement issue; the question presented there was whether to judicially create a damages remedy for unconstitutional, gender-based employment discrimination. *Id.* at 244-245. Because reinstatement was impossible and there were no state-law remedies available, it was

"damages or nothing" for the plaintiff. *Id.* at 245 & n.23 (internal quotations omitted). Nor was there an "*explicit* congressional declaration that persons in [the plaintiff's] position may not recover money damages." *Id.* at 246-247 (emphasis in original, internal quotations omitted). But not even respondent presses this as the standard for displacement.

Smith, meanwhile, held that the EHA might not displace all Rehabilitation Act claims because the acts are "different substantive statutes." 468 U.S. at 1016. Because § 1983 creates no new substantive rights, the Rehabilitation Act displacement question required a "different analysis" than the question whether the EHA displaces equal protection claims. *Ibid.* Finally, respondent misdescribes the interplay (at issue in *Preiser*) between § 1983 and the federal Habeas Corpus Act. A state prisoner challenging the fact or duration of confinement has no § 1983 action for damages if proving the "damages claim necessarily demonstrates the invalidity of the conviction" and the prisoner does not demonstrate "that the conviction * * * has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 481-482, 487-488 (1994). Respondent's contrary claim (at p. 18) misstates the law.

3. Nor is there merit to respondent's contention that, to displace § 1983 as a remedy for constitutional violations, a statute "ordinarily" must offer remedies that are at least as favorable to would-be plaintiffs as the remedies available under § 1983. Resp. Br. 35. Respondent derives this requirement from a passage in *Smith*, where the Court recognized that the "carefully tailored" scheme Congress created in the EHA was "the

most effective vehicle for protecting the constitutional right of a handicapped child to a public education." 468 U.S. at 1012-1013. But "most effective" does not mean "most pro-plaintiff." Rather, it refers to Congress having "carefully tailored" a remedy to the specific right at issue. The very reason for the dispute before the Court in *Smith* was the fact that, unlike § 1983 and § 1988, the EHA did not afford the plaintiff the right to attorney's fees. So the Court could not have used the phrase "most effective vehicle" as respondent here reads it. In fact, contrary to respondent's repeated objection (at pp. 29, 34-35, 36-37), this Court has recognized that more restrictive statutory remedies show that Congress does intend to displace a competing remedy under § 1983. See *Rancho Palos Verdes*, 544 U.S. at 121, 124 ("limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983").

4. Finally, there is nothing to respondent's reliance on *Kimel* (at pp. 7, 35-36). The Court there did not hold that Congress did not intend the ADEA to protect rights already covered by the Equal Protection Clause; it held that Congress "prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional." 528 U.S. at 86. And if respondent's claim is that the ADEA does not displace § 1983 remedies because the Act does not abrogate States' Eleventh Amendment immunity, such a claim is foreclosed by *Dellmuth v. Muth*, 491 U.S. 223 (1989), which holds that the EHA—which, *Smith* establishes, displaces § 1983 equal protection

claims—does not abrogate this immunity either. *Id.* at 232.

III. Respondent May Not Ask The Court To Ignore Parts Of The ADEA's Remedial Regime.

When respondent finally addresses the ADEA's remedial regime, he ignores or understates its major elements, describing it as a mere "combination of a private right of action with the charge filing requirement." Resp. Br. 33. In reality, the ADEA's remedial scheme consists of a comprehensive combination of remedies, limits on remedies, and administrative procedures. Pet. Br. 19-34. And respondent's effort to downplay these elements—arguing that the ADEA is no different than Title VII and that GERA's remedies are immaterial to the displacement analysis—is misguided.

A. It Is Irrelevant That The ADEA Has Some Remedial Elements In Common With Title VII.

Respondent's reasoning appears to proceed as follows: this Court has held that Title VII does not displace § 1983 equal protection claims, Title VII shares certain remedial elements with the ADEA, therefore the ADEA must not displace § 1983 equal protection claims or, at least, the laws' common elements may not be considered in deciding whether the ADEA's regime is sufficiently comprehensive. Resp. Br. 41-49.

This logic fails. As an initial matter, respondent's premise—that "[t]his Court has repeatedly held that

Title VII does not bar covered employees from bringing a § 1983 action under the Equal Protection Clause," Resp. Br. 41 (footnote omitted)—is false, for none of the cases respondent cites actually reaches that holding. The more fundamental point, however, is that whether Title VII displaces § 1983 equal protection claims is immaterial to whether the ADEA does, as the Seventh Circuit recognized. See Pet. App. 31a-32a n.5.

1. Title VII's legislative history, unlike the ADEA's, offers clear evidence that Congress did not want the statute to displace § 1983 remedies for equal protection violations, a point that respondent amplifies in his brief (at p. 49). See H.R. Rep. 92-238, at 17 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154 ("In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to * * * 1981 and 1983, is in no way affected.").

In fact, while respondent observes that many circuits have held that Title VII does not displace § 1983 as a remedy for constitutional claims, Resp. Br. 43, he omits that many have done so relying on Title VII's legislative history. See, *e.g.*, *Latoski v. James*, 66 F.3d 751, 755-756 (5th Cir. 1995); *Keller v. Prince George's Cnty.*, 827 F.2d 952, 958 (4th Cir. 1987); *Trigg v. Fort Wayne Cmty. Schs.*, 766 F.2d 299, 300-301 & n.3 (7th Cir. 1985); *Day v. Wayne Cnty. Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984); *Torre v. Barry*, 661 F.2d 1371, 1373-1375 (D.C. Cir. 1981). Nor does respondent acknowledge that all circuits that displace constitutional age claims have reached a different rule for Title VII.

Rivera v. P.R. Aqueduct & Sewers Auth., 331 F.3d 183, 192 n.7 (1st Cir. 2003); *Keller*, 827 F.2d at 956-963; *Latoski*, 66 F.3d at 755-756; *Roberts v. Coll. of the Desert*, 870 F.2d 1411, 1415-1416 (9th Cir. 1988); *Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989); *Torre*, 661 F.2d at 1373-1375.

2. Further, the ADEA and Title VII offer very different remedial regimes, as this Court has recognized. See *infra* p. 19. To be sure, Title VII and the ADEA have some remedial elements in common. But many statutes share such features, and that does not mean that all laws with a common element (the right to punitive damages, for example) have the same remedial regime, or that, if one of these laws fails to displace § 1983 remedies, the same must be true for all of them.

It is a statute's overall remedial regime that matters, and here the ADEA and Title VII diverge sharply. Unlike Title VII, the ADEA forbids awards of punitive damages and compensatory damages for pain and suffering. See Pet. Br. 37-38; *C.I.R. v. Schleier*, 515 U.S. 323, 326 (1995). This alone is compelling evidence of Congress' intent to displace the more general, § 1983 remedy. See *supra* p. 15. And these limitations also affect the ADEA's other remedial elements. Respondent suggests (at p. 45), for example, that few plaintiffs would forego an ADEA claim and rely solely on § 1983. But he not only ignores reasons why plaintiffs may choose not to proceed under the ADEA—*e.g.*, a failure to meet the Act's rigorous filing deadlines or a desire to keep the EEOC from exercising authority over the case—he also disregards the effects of an ongoing § 1983 suit, with a demand for punitive damages, on the

EEOC's ability to resolve a parallel ADEA claim informally.

As this Court has recognized, the ADEA also incorporates much of the FLSA's comprehensive remedial regime, something Title VII does not do: "[R]ather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII's substantive prohibitions." *Lorillard v. Pons*, 434 U.S. 575, 584-585 (1978). And while respondent attempts to downplay *Lorillard*'s relation to this case (at p. 47), *Lorillard* discussed section 7(b) of the ADEA, 29 U.S.C. § 626, and the incorporated FLSA provisions codified at 29 U.S.C. §§ 216, 217, see 434 U.S. at 578-580, the very provisions on which petitioners relied in their opening brief (at pp. 25-26).

Nor do petitioners contend that the FLSA (and therefore the ADEA) displaces every federal law and preempts every state law that—unlike § 1983, which creates no substantive rights—provides affirmative, pay-related protections. Resp. Br. 39-40. The point, rather, is that courts have recognized the FLSA for its "unusually elaborate enforcement scheme," *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999), whether in the course of displacing § 1983 as a competing remedy for FLSA violations, or in displacing parallel claims to enforce minimum wage and overtime rights independent of the FLSA but within that statute's scope. See, *e.g.*, *Karna v. BP Corp. N. Am., Inc.*, 2013 WL 1155485, at *20 (S.D. Tex. Mar. 19, 2013) (collecting cases); *Walker v. Serv. Corp. Int'l*, 2011 WL 1370575, at *6 (W.D. Va. Apr. 12, 2011); see also Pet.

Br. 26-27. By incorporating FLSA remedies, the ADEA creates its own "unusually elaborate" scheme. See Pet. Br. 25-27 (describing incorporated FLSA remedies).

B. Respondent's Approach To GERA Is Unsound Legally And Impossible To Follow In Practice.

Finally, GERA is part and parcel of the ADEA's remedial regime and is therefore relevant in deciding whether that regime displaces remedies under § 1983. Respondent depicts GERA as if it were the source of substantive rights independent of the ADEA, and suggests that GERA is irrelevant to the *Sea Clammers/Smith* analysis because it also applies to Title VII rights. Resp. Br. 49-53. The second half of this argument fails for the reasons stated above (at pp. 18-19), and respondent is wrong to depict GERA as anything other than part of the ADEA's remedial regime.

1. GERA creates no rights or protections of its own. Rather, it extends rights in the ADEA (and other civil rights laws, including Title VII) to a group of state and municipal officials whom Congress had initially exempted from coverage. That GERA was extending these preexisting rights—and is therefore part of the ADEA's remedial regime rather than a freestanding source of anti-discrimination protections—is obvious from the face of the statute. Section 2000e-16c is entitled "Coverage of previously exempt State employees," and (with the exception of elected officials themselves) extends rights to the same classes of public employee—"member[s] of the elected official's personal

staff," "policymak[ers]," and "immediate advisor[s]" to elected officials—that § 630(f) of the ADEA had exempted from coverage. By expressly incorporating 29 U.S.C. § 633a, § 2000e-16b then extends all of the ADEA's age discrimination rights, remedies, and limitations to these officials. The EEOC may even *sua sponte* reclassify charges that cite the ADEA as complaints subject to GERA's procedures, and vice versa. 29 C.F.R. § 1603.102(e).

2. Nor does it matter that Congress extended the ADEA's substantive coverage by passing a separate statute rather than by amending language in the ADEA. There is no meaningful difference between altering an existing law by amending its own language and enacting a new provision to the same effect elsewhere in the U.S. Code. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439-440 (1992). The ADEA, Title VII, and other laws that GERA extends predated GERA, making it simpler to pass a new law extending all of them to the same classes of public officials, rather than amending each statute. Congress used the same method to abrogate States' Eleventh Amendment immunity under Title IX and other civil rights laws in a single section of the Rehabilitation Act Amendments of 1986. See 42 U.S.C. § 2000d-7; *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 72 (1992). Even though § 2000d-7 appears in Title 42 of the U.S. Code, and Title IX is codified in Title 20, this Court recognizes the former as an "amendment[]" to the latter. *Franklin*, 503 U.S. at 72.

The Genetic Information Nondiscrimination Act of 2008 ("GINA"), Pub. L. 110-233, further illustrates the

point. Unlike the ADEA and other laws whose rights GERA incorporates by reference, GINA was passed after GERA, and it was therefore possible to incorporate GERA's procedures *into it*, which GINA does at 42 U.S.C. § 2000ff-6(b) for the high-level employees that GERA covers. There can be no dispute that GERA's procedures are part of GINA's remedial regime, for the former are incorporated on the face of the latter. Yet the functional relationship between GINA and GERA is the same as the one between the ADEA and GERA.

3. Finally, it would be impracticable to treat the ADEA and GERA separately in deciding whether to displace § 1983 remedies for age-bias claims. It cannot be, for example, that the ADEA displaces § 1983 remedies for constitutional age-bias claims, while GERA does not. As this case illustrates, whether a plaintiff falls within one of the § 630(f) exemptions is often a fact-intensive inquiry that makes a final resolution before trial (and likely appeal) impossible. See *Teneyuca v. Bexar Cnty.*, 767 F.2d 148, 152 (5th Cir. 1985) ("highly factual nature of the inquiry necessary to the determination of the 'personal staff' exception does not lend itself well to disposition by summary judgment"). Indeed, waiting until then to know whether it is proper to dismiss a plaintiff's § 1983 equal protection claim would be particularly absurd in cases where the plaintiff pursues only a constitutional claim. The parties would have to litigate over whether the plaintiff falls within one of the § 630(f) exemptions to decide whether his § 1983 claim can proceed—even though there is no ADEA claim in the case.

In short, GERA is an inseparable element of the ADEA's remedial regime, and, as the opening brief showed (at pp. 30-34), its addition to that regime and the history surrounding its passage provide additional support for the displacement of § 1983 as a remedy for competing constitutional claims. This includes the fact that GERA followed on the heels of failed efforts by Congress to enact "Rules of Construction for Civil Rights Laws," an attempt to overturn *Smith*'s principles for displacing § 1983 remedies for constitutional violations. Pet. Br. 32-33. And it was Congress' failed effort to overturn these principles from *Smith* that petitioners detailed in their opening brief, not Congress' response to that decision's implications for the EHA, specifically, as respondent suggests. Resp. Br. 30.

IV. There Is No Reason To Vacate The Seventh Circuit's Decision On Prudential Grounds.

The contention of one of the *amici* that the Seventh Circuit lacked jurisdiction over the question presented and improperly exercised pendant appellate jurisdiction fails on several grounds. Law Prof. Br. 11. At the threshold, this claim proceeds from the false premise that the Seventh Circuit relied on pendant jurisdiction to resolve the appeal. In fact, the Seventh Circuit mentions that doctrine only in a parenthetical describing one of respondent's cases. Pet. App. 7a. Instead, the court based its jurisdiction on the fact that "the very existence of a freestanding damages remedy under § 1983 *is directly implicated* by a qualified immunity defense," citing *Wilkie v. Robbins*, 551 U.S. 537 (2007). Pet. App. 8a (emphasis added).

Indeed, regardless of the Seventh Circuit's perceived basis for exercising jurisdiction, *Wilkie* controls here, and that decision did not rest on an exercise of pendant jurisdiction. In a qualified immunity appeal, whether a cause of action exists for an alleged constitutional violation is not a question considered *in addition* to an appealable interlocutory determination, as a pendant claim would be. See *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 50-51 (1995). Rather, the issue is itself subject to immediate review under the collateral order doctrine. *Wilkie*, 551 U.S. at 550 n.4. This is so because the qualified immunity inquiry has two prongs: whether there has been a violation of federal law, and whether that law was clearly established at the relevant time. *Camreta v. Greene*, 131 S. Ct. 2020, 2031-2032 (2011). And before a court can determine whether there has been a violation of federal law under the first prong, it may have to determine whether a cause of action exists for a violation of that federal law, and, if so, the elements of the claim. *Wilkie*, 551 U.S. at 550 n.4; *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 672-673 (2009) (discussing *Wilkie* and *Hartman*).

Accordingly, the Seventh Circuit properly exercised jurisdiction over the question presented.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
CLIFFORD W. BERLOW
MATTHEW P. BECKER
Ass't Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

SEPTEMBER 2013

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 9 - 2013
OFFICE OF THE CLERK

No. 12-872

In The Supreme Court of the United States

LISA MADIGAN, in her individual capacity, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,

Petitioners,

v.

HARVEY LEVIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE AARP AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF RESPONDENT

ANNA RICH
NATIONAL SENIOR CITIZENS LAW CENTER
1330 Broadway, Ste 525
Oakland, CA 94612
Tel. (510) 663-1055
arich@nsclc.org

Counsel for Amici Curiae National Senior Citizens Law Center

THOMAS OSBORNE*
DANIEL KOHRMAN
LAURIE MCCANN
*Counsel of Record
AARP FOUNDATION LITIGATION

MELIVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2066
tosborne@aarp.org

Counsel for Amici Curiae AARP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. LIKE ITS CLOSEST LEGISLATIVE PARALLEL, TITLE VII, THE ADEA PROVIDES THE EXCLUSIVE FEDERAL REMEDY FOR VIOLATIONS OF ITS OWN STATUTORY PROVISIONS, BUT DOES NOT PRECLUDE CLAIMS FOR VINDICATION OF CONSTITUTIONAL RIGHTS 5

A. The ADEA's Closest Legislative Parallel Is Title VII 5

B. The ADEA's Relationship To The FLSA Is More Pragmatic Than Substantive And Is Essentially Fortuitous 7

C. The ADEA And The FLSA Are Inherently Different 10

D. ADEA Statutory Rights Diverge Significantly from § 1983 Equal Protection Age Discrimination Claims 15

E. Unlike Rights Enforceable Under Title VII And The ADEA, The Rights Created By The FLSA Are Not Based On Rights Also Guaranteed By The Constitution 17

II. PERMITTING PUBLIC EMPLOYEES TO CHALLENGE WORKPLACE AGE BIAS UNDER § 1983 AND THE EQUAL PROTECTION CLAUSE WOULD NOT UNDERMINE FEDERAL STATUTORY PROTECTIONS AGAINST AGE DISCRMINATION 20

A. Due To *Kimel*, Private Enforcement Of Federal Statutory Age Discrimination Protections For State Employees Is Quite Limited 21

B. EEOC Enforcement Of Federal Statutory Age Discrimination Protections For State Employees Is Minimal 24

C. The Availability of Monetary Relief And The Greater Ease of Proving Age Discrimination For Non-State Public Employees Under The ADEA and GERA Means Such Employees Are Unlikely To Use A § 1983 Equal Protection Claim to "Bypass" Federal Statutory Age Discrimination Claims and Processes 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Coleman v. City of Omaha,
714 F.2d 804 (8th Cir. 1983) 14

Delaware State College v. Ricks,
449 U.S. 250 (1980) 11

EEOC v. Delaware State Police,
618 F. Supp. 451 (D. Del. 1985) 12

EEOC v. Elrod,
674 F2d 601 (7th Cir. 1982) 6, 9, 10

EEOC v. Gladieux Refinery, Inc.,
631 F.Supp. 927 (N.D. Ind. 1986) 12

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 15

Goldstein v. Manhattan Indus., Inc.,
758 F.2d 1435 (11th Cir. 1985) 14

Gomez-Perez v. Potter,
553 U.S. 474 (2008) 1

Gregory v. Ashcroft,
501 U.S. 452 (1991) 2

Gross v. FBL Fin. Servs.,
557 U.S. 167 (2009) 1

Heiar v. Crawford Cty., Wis., 746 F.2d 119014 (7th Cir. 1984) 14

Herman v. Nat'l Broadcasting Co., Inc., 744 F.2d 604 (7th Cir. 1984) 12

Kelly v. Wauconda Park Dist., 801 F.2d 269 (7th Cir. 1986) 10

Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) ..... *passim*

Kuhn v. Goodlow, 678 F.3d 552 (7th Cir. 2012) 15

Ky. Ret. Sys. v. EEOC, 554 U.S. 135 (2008) 1

Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012) ..... *passim*

Lorillard v. Pons, 434 U.S. 575 (1978) 6, 7, 12

Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) 2, 29

McKennon v. Nashville Banner Publ. Co., 513 U.S. 352 (1995) 6, 7

Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008) 1

Mummelthie v. City of Mason City, Iowa,
873 F.Supp. 1293 (N.D. Iowa 1995) 17, 18

Mustafa v. State of Neb. Dep't of Corr. Servs.,
196 F. Supp. 2d 945 (D. Neb. 2002)..... 16, 18

Oscar Meyer & Co. v. Evans,
441 U.S. 750 (1979)..... 6

Rodriguez v. Taylor,
569 F.2d 1231 (3d Cir. 1977) 14

Runyan v. Nat'l Cash Register Corp.,
787 F.2d 1039 (6th Cir. 1986)..... 11, 12

Smith v. City of Jackson,
544 U.S. 228 (2005)..... 1

Sullivan v. Crown Paper Bd. Co.,
719 F.2d 667 (3d Cir. 1983) 14

Vance v. Bradley,
440 U.S. 93 (1979)..... 2

Zombro v. Baltimore City Police Dep't,
868 F.2d 1364 (4th Cir. 1989)..... 17, 18

CONSTITUTION & FEDERAL STATUTES

15 U.S.C. § 49 12

Age Discrimination in Employment Act (ADEA),
29 U.S.C. §§ 621-634..... 1

29 U.S.C. § 623(a)-(c) 15
29 U.S.C. §§ 623(j) 15
29 U.S.C. § 626(a) 12, 26
29 U.S.C. § 626(b) 7, 13, 26
29 U.S.C. § 630(f) 15
29 U.S.C. § 631(a) 15, 16

Equal Employment Opportunity Act of 1972,
Pub.L.No. 92-261, 86 Stat. 103 9

Fair Labor Standards Act (FLSA),
29 U.S.C. § 201 ..... 4, 10
29 U.S.C. § 216 13
29 U.S.C. § 217 13

Government Employee Rights Act,
42 U.S.C. § 2000e-16a – 200e-16c ..... *passim*

42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 1988 14

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e 4, 9, 20
42 U.S.C. § 2000e-5(g) 13

LEGISLATIVE HISTORY

113 Cong. Rec. 7076 (1967) 8

118 Cong. Rec. 7745 (1972) 9

Age Discrimination in Employment:
Hearings Before the Gen. Subcomm.
On Labor of the H. Comm. on Educ.
And Labor, 90th Cong. 13 (1967) 8

Age Discrimination in Employment:
Hearings Before the Subcomm. on Labor
of the S. Comm. on Labor and Public
Works, 90th Cong. 44 (1967).....11

Age Discrimination in Employment Act,
FY 1997-FY 2012, EEOC,
AgeDiscriminationwww.eeoc.gov/
eeoc/statistics/enforcement/adea.cfm 25

Civil Rights Reorganization,
14 Weekly Comp. Pres. Doc. 398
(Feb. 23, 1978).....8

H. R. Rep. No. 92-238, 92d Cong., 2d Sess.,
reprinted in (1972) U.S.Code Cong. & Ad.News
2137, 2154 9

EEOC Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321
(1978), reprinted in 92 Stat. 3781 (1978).....8

S.Rep.No.93-690, 93d Cong., 2d Sess. 55 (1974)
120 Cong.Rec. 8768 (1974) 10

S. Special Comm. on Aging, 93d Cong.
IMPROVING THE AGE DISCRIMINATION
LAW: A WORKING PAPER, 11
(Comm. Print 1973) 8

OTHER AUTHORITIES

EEOC, "The 2000s: Charting A Course for the 21st Century", http://www.eeoc.gov /eeoc/history/35th/2000s/index.html 21, 22

EEOC, "Mediation," www.eeoc.gov/employees/mediation.cfm 27

EEOC, "Resolving a Charge," www.eeoc.gov/employers/resolving.cfm 27

EEOC, "Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission," March 2006, at section I.A. (citing *Kimel*) available at http://www.eeoc.gov/eeoc/task_reports/systemic.efc 24

Daniel P. O'Meara, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 94 (1989) 10

Carlton J. Snow, *American Law in a time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section III Collective Agreements and Individual Contracts Employment in Labor Law*, 50 AM J. COMP. L. 319 (Fall 2002) 22

Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New "Federalism" Era*, 22 BERKELEY J. EMP. & LAB. L. 99 (2001) 22

U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016 (approved Dec. 17, 2012) available at http://www.eeoc.gov/eeoc/plan/sep.cfm 26

INTEREST OF AMICI CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is dedicated to addressing the needs and interests of people aged fifty and older, including older workers, and strives through legal and legislative advocacy to preserve the means to enforce their rights. AARP has a long history of advocating for vigorous enforcement of age discrimination laws at the federal and state level, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (ADEA). AARP has submitted briefs to this Court in virtually all recent cases construing the ADEA, *see e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135 (2008); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Gross v. FLB Fin. Servs.*, 557 U.S. 167 (2009), as well as virtually all cases involving age discrimination claims under the Equal

---

[1] In accordance with Supreme Court Rule 37.6, Amici state that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than Amici and its counsel have made a monetary contribution to the preparation or submission of this brief. Written consent of the parties has been obtained and will be filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Protection Clause of the Fourteenth Amendment to the U.S. Constitution, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization whose principal mission is to protect the rights of low income older adults. For more than 40 years, NSCLC has sought to ensure the health and economic security of older persons with limited income and resources, through advocacy, litigation, and the education and counseling of local advocates. NSCLC's Federal Rights Project seeks to keep the courts open to justice and works to ensure that people retain the right to enforce basic guarantees to health care, economic security and civil rights. NSCLC has also participated as counsel in class action lawsuits representing older adult workers facing age discrimination. NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' ability to enforce their rights to fair treatment as employees.

Amici's interest in this case arises from Petitioners' attempt to persuade this Court to frustrate Congress' intent in enacting the ADEA by holding that the ADEA's comprehensive remedial provisions provide the exclusive federal damages remedy for age discrimination, thereby precluding constitutional claims for age discrimination pursuant to 42 U.S.C. § 1983. Such a result would leave employees of state government entities, who

are covered by the ADEA,[2] but who are barred by this Court's decision in *Kimel* from suing their state employers for money damages, without a federal damages remedy for age discrimination. Congress surely could not have intended such a result when it extended coverage of the ADEA to state (as well as federal) employees in 1974. In this brief, Amici urge the Court to reject such a result by holding that the ADEA's comprehensive remedies apply only to violations of its own terms, an outcome that permits constitutional claims by state employees who cannot seek a damages remedy under the statute itself.

SUMMARY OF THE ARGUMENT

Since its enactment in 1967, the Age Discrimination in Employment Act (ADEA) has achieved significant progress in decreasing the prevalence of age discrimination in the work place. However, Congress never intended the ADEA to be the exclusive remedy for age discrimination. Instead, the ADEA was intended to be a floor complementing those protections against age discrimination that pre-existed its enactment and not a ceiling foreclosing future protections from being added to assist in the fight against ageism.

---

[2] Amici agree with Respondent that the Question Presented is not raised by the facts of this case, *see* Brief of Respondent at 8-15, and further that "the only question regarding the ADEA actually presented by the circumstances of this case is whether the ADEA precludes a section 1983 age-based equal protection claim by an employee (like Levin) who is *not* covered by the ADEA." *Id.* at 16.

Although the ADEA's procedural and remedial provisions were derived from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, (FLSA), Congress' assignment of enforcement of the ADEA to the Wage and Hour Division in the Department of Labor using FLSA procedures and remedies was based on pragmatic, not substantive, considerations. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), not the FLSA, is the ADEA's closest legislative parallel. Therefore, the analysis of congressional intent concerning the exclusivity of the ADEA for addressing work place age discrimination should place significantly more weight on the analogy between Title VII and the ADEA than that between the ADEA and the FLSA.

Allowing individuals to seek recovery for age discrimination through a claim under 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment would not undermine the comprehensive remedial scheme set forth in the ADEA. Because this Court held in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), that the ADEA was an invalid abrogation of states' Eleventh Amendment immunity, there is no meaningful private enforcement of federal age discrimination protections for state employees. And although *Kimel* did not deprive the Equal Employment Opportunity Commission (EEOC) of its authority to enforce the ADEA against the states, the agency's efforts in this regard have been minimal at best. The inability of state employees to obtain meaningful private relief under the ADEA combined with the dearth of enforcement actions by the EEOC essentially has

left these workers without a federal damages remedy for age discrimination. A § 1983 equal protection claim would provide such a remedy. This result is consistent with Congress' intent in enacting federal statutory protections against age discrimination in employment.

ARGUMENT

I. LIKE ITS CLOSEST LEGISLATIVE PARALLEL, TITLE VII, THE ADEA PROVIDES THE EXCLUSIVE FEDERAL REMEDY FOR VIOLATIONS OF ITS OWN STATUTORY PROVISIONS, BUT DOES NOT PRECLUDE CLAIMS FOR VINDICATION OF CONSTITUTIONAL RIGHTS.

A. The ADEA's Closest Legislative Parallel Is Title VII.

Like Title VII, which prohibits discrimination based on race, color, religion, sex, or national origin, the text of the ADEA does not address whether it is the exclusive remedy for age discrimination in employment. To make this determination, this Court should analyze the legislation most analogous to the ADEA. Contrary to Petitioners' contention, that legislation is not the FLSA, but Title VII.

On more than one occasion, this Court has acknowledged the shared goals of the ADEA and Title VII: "[T]he ADEA and Title VII share a common purpose, the elimination of discrimination

in the workplace . . . ." *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756 (1979). This Court has clearly expressed its conviction that the ADEA is an integral part of the nation's collective law prohibiting arbitrary employment discrimination: "The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 357 (1995) (grouping the ADEA with Title VII, the Americans with Disabilities Act (ADA), the National Labor Relations Act (NLRA), and the Equal Pay Act). Importantly, in *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), this Court declared:

> There are important similarities between [Title VII and the ADEA] . . . both in their aims - the elimination of discrimination from the workplace – and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII."

Relying in part on *Lorillard* and citing the similar "objectives, substantive prohibitions, and legislative histories" of Title VII and the ADEA, the court below reaffirmed its conclusion in *EEOC v. Elrod*, 674 F2d 601, 607 (7th Cir. 1982), that "Title VII is the legislation which most closely parallels the ADEA." *Levin v. Madigan*, 692 F.3d 607, 620 n. 5 (7th Cir. 2012). As pointed out in *Elrod*, after enforcement of the ADEA was transferred from the Wage and Hour Division of the Department of Labor to the EEOC in 1978, the EEOC published

guidelines which stated: "It is the Commission's position that these proposed interpretations be interpreted in a manner which is consistent with Title VII." 674 F.2d at 610 n. 12, citing 44 Fed.Reg. 68,858 (1979). While candidly acknowledging that "the remedial provisions of the ADEA, which we focus on in determining exclusivity, differ from those of Title VII," *Madigan*, 692 F.3d at 620 n. 5, the lower court nevertheless completely rejected any reliance on the FLSA, concluding (correctly) that "cases addressing FLSA exclusivity speak little" to the issue this Court must decide. *Madigan*, 692 F.3d at 620.

B. The ADEA's Relationship To The FLSA Is More Pragmatic Than Substantive And Is Essentially Fortuitous.

The ADEA "incorporates some features of both Title VII and the Fair Labor Standard Act of 1938, which has led [this Court] to describe it as 'something of a hybrid.'" *McKennon*, 513 U.S. at 357, (quoting *Lorillard*, 434 U.S. at 578). Specifically, the substantive provisions of the ADEA are modeled after Title VII, while its remedial provisions incorporate provisions of the FLSA. *Id.*; 29 U.S.C. § 626(b).

The purpose of incorporating the remedial, *i.e.*, enforcement, provisions of the FLSA into the ADEA was "to utilize the existing investigative and enforcement machinery of the Wage and Hour Division of the Department of Labor" the federal

agency designated to enforce the ADEA.[3] S. Special Comm. on Aging, 93d Cong. IMPROVING THE AGE DISCRIMINATION LAW: A WORKING PAPER, 11 (Comm. Print 1973). The legislative history of the ADEA indicates that the Wage and Hour Division was chosen for reasons of administrative efficiency. At the time Congress was drafting the ADEA in 1967, the fledgling EEOC was already backlogged with uninvestigated charges of race and sex discrimination. *See* 113 Cong. Re. C. 7076 (1967) (testimony of Sen. Javits); *Age Discrimination in Employment*: Hearings Before the Gen. Subcomm. On Labor of the H. Comm. on Educ. And Labor, 90th Cong. 13 (1967). Significantly, Congress did not prohibit age discrimination through an amendment to the FLSA, but rather enacted a separate statute – the ADEA and chose the Wage and Hour Division as the enforcement agency, which would allow enforcement of the ADEA to proceed under procedures with which the Division was familiar due to its long experience with enforcing the FLSA.[4]

---

[3] As originally enacted, the ADEA refers only to the Secretary of Labor. It was the understanding of Congress in 1967 that the Wage and Hour Division would enforce the ADEA. *See, e.g.*, 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

[4] In 1978, the Carter Administration decided that the ADEA would be more efficiently enforced by the EEOC and transferred the duties of ADEA enforcement from the Wage and Hour Division to the EEOC. Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), reprinted in 92 Stat. 3781 (1978). Among President Carter's stated objectives was efficiency, specifically to "produce more effective law enforcement through unification of planning, training and sanctions." *See* Civil Rights Reorganization, 14 Weekly Comp. Pres. Doc. 398 (Feb. 23, 1978).

In *EEOC v. Elrod*, 674 F.2d at 604-605, the Seventh Circuit described the legislative process which extended the coverage of the ADEA to state public employees:

> Legislation to extend the ADEA to government employees was first introduced on March 9, 1972, by Senator Bentsen. S. 3318, 92d Cong., 2d Sess. (1972); 118 Cong.Rec. 7745 (1972). Also in March of 1972, Congress considered and passed amendments to Title VII which extended coverage of that act to state and local government employees. Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 103 (amending 42 U.S.C. § 2000e). The Title VII amendments were explicitly passed under § 5 of the Fourteenth Amendment. H.R.Rep.No. 92-238, 92d Cong., 2d Sess., reprinted in (1972) U.S.Code Cong. & Ad.News 2137, 2154. In May of 1972, Senator Bentsen again presented his proposed amendment to the ADEA. 118 Cong.Rec. 15894 (1972). The Senator noted the overwhelming approval of the Title VII amendments by Congress, and urged similar support for the ADEA amendment, arguing that the principles underlying the Title VII amendments "are directly applicable to the Age Discrimination in Employment

> Act." *Id.* at 15895. The Senate voted in favor of the ADEA amendment 86-0, but the amendment failed to survive House-Senate conference committees after being attached to two bills. S.Rep.No.93-690, 93d Cong., 2d Sess. 55 (1974); 120 Cong.Rec. 8768 (1974) (remarks of Sen. Bentsen).
>
> In 1974, the ADEA amendment was reintroduced and passed with a group of amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. ("FLSA").

Thus, "the connection of the [1974] ADEA amendment [extending coverage to state and federal public employees] to the legislation enacting FLSA amendments was largely fortuitous." *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271 n.4 (7th Cir. 1986), quoting *Elrod*, 674 F.2d at 610.

C. The ADEA And The FLSA Are Inherently Different.

Wage and hour violations are "inherently different," from employment discrimination, Daniel P. O'Meara, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 94 (1989). According to Secretary of Labor Wirtz, who recommended that Congress place enforcement of the ADEA with an agency other than the Wage and Hour Division:

> There are ... real differences between the enforcement of minimum wage law and the enforcement of a prohibition against discrimination ... it takes a very different approach to administer a prohibition against discrimination on the basis of age than it does a minimum wage law.

Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the S. Comm. on Labor and Public Works, 90th Cong. 44 (1967).

Due to these inherent differences between employment discrimination and wage and hour violations, in several areas where ADEA and Title VII differ in remedial/procedural provisions the courts have often ignored FLSA precedent and used Title VII precedent. *See* O'Meara, *supra,* 85-88. The following examples serve to illustrate this point:

1. Although the ADEA statute of limitations is incorporated by reference from the FLSA statute of limitations, courts have unanimously applied *Delaware State College v. Ricks*, 449 U.S. 250 (1980), a Title VII decision holding that the limitations period is triggered when the employee was informed of his impending termination rather than on his last day of employment to the ADEA. *See, e.g., Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044 n. 8 (6th Cir.

1986); *Herman v. Nat'l Broadcasting Co., Inc.*, 744 F.2d 604, 606 (7th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

2. The EEOC's subpoena power is derived from the Wage and Hour Division's power under the FLSA, yet the courts have defined the EEOC's subpoena powers by looking to the agency's subpoena powers defined in Title VII.[5] Even though this Court stated in *Lorillard* that when courts interpret language incorporated from the FLSA, such as the FLSA/FTCA subpoena language, they should look exclusively to FLSA case law and that reliance on Title VII case law is "misplaced," 434 U.S. at 585, lower courts have regularly looked to Title VII case law when deciding ADEA subpoena cases. *See, e.g., EEOC v. Gladieux Refinery, Inc.*, 631 F.Supp. 927, 930-35 (N.D. Ind. 1986); *EEOC v. Delaware State Police*, 618 F. Supp. 451, 453 (D. Del. 1985).

---

[5] Section 7(a) of the ADEA, 29 U.S.C. § 626(a), authorizes the EEOC to issue subpoenas by incorporating § 209 of the FLSA, which, in turn, incorporates § 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which states that "the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of" documentary evidence. Thus, the ADEA indirectly adopts the subpoena provisions of the FTC.

3. Even though the ADEA's language authorizing an award of back pay is incorporated from the FLSA, which defines back pay as mandatory with no provision for a duty to mitigate, the courts have looked to Title VII's back pay language to hold that a back pay award under the ADEA, like such an award under Title VII, is discretionary and that a duty to mitigate exists. Section 7 of the ADEA, 29 U.S.C. § 626 (b) provides that "[a]mounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages ... for purposes of sections 216 and 217 of this title ...." Section 216 is section of the FLSA, which provides that '[a]ny employer who violates ... this title shall be liable to the employee ... in the amount of their unpaid minimum wages ...." Section 7 further provides that back pay "shall" be awarded, while the similar provision of Title VII, section 706(g), 42 U.S.C. §2000e-5(g), states that if the court finds a violation of Title VII, "the court may ... order ... reinstatement or hiring of employees, with or without back pay ...." Nevertheless, the "overwhelming pattern" among the lower courts has been to rely on Title VII case law when deciding ADEA back pay questions. O'Meara, *supra* at 295; *see, e.g.*,

Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1446 (11th Cir. 1985); *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

4. Although the ADEA's authorization of attorney's fee awards is derived from the FLSA, the lower courts have looked to federal anti-discrimination law, *i.e.*, 42 U.S.C. § 1988 (the Civil Rights Attorney's Fees Awards Act of 1976) and Title VII, instead of the FLSA, in determining such awards. *See Sullivan v. Crown Paper Bd. Co.*, 719 F.2d 667, 669 n.1 (3d Cir. 1983) ("The fact that attorney's fees under the ADEA are governed by the Fair Labor Standards Act . . . rather than the principal fee award statute . . . is of no consequence. Section 216(b) provides only that 'reasonable' fees may be awarded. It has been the practice of federal courts to treat the various fee-shifting antidiscrimination statutes as governed by the same standards."); *Heiar v. Crawford Cty., Wis.*, 746 F.2d 1190, 1203 (7th Cir. 1984) ("Although the [ADEA] is not a civil rights act within the meaning of section 1988, age discrimination cases commonly cite section 1988 cases on fee questions . . . ."); *Rodriguez v. Taylor*, 569 F.2d 1231, 1250 (3d Cir. 1977) ("[I]n the analogous context of ADEA

> suits, district court judges should look to cases of similar complexity, in particular other employment discrimination and related civil rights suits, to determine reasonable hourly rates for counsel who do not have normal practice billing rates.").

The courts' reliance on Title VII decisions rather than FLSA cases serves to confirm that Title VII, not the FLSA, is the ADEA's closest legislative parallel.

D. ADEA Statutory Rights Diverge Significantly from § 1983 Equal Protection Age Discrimination Claims.

An ADEA plaintiff may sue only his employer, an employment agency or a labor organization. 29 U.S.C. § 623(a) – (c). Under § 1983, a plaintiff may sue individuals – so long as that individual caused or participated in the alleged deprivation of the plaintiff's constitutional rights. 42 U.S.C. § 1983. *See Madigan*, 692 F.3d at 621, citing *Kuhn v. Goodlow*, 678 F.3d 552, 555-56 (7th Cir. 2012). As is particularly pertinent here, the ADEA expressly limits or exempts claims by certain individuals, including elected officials and certain members of their staff, appointees, law enforcement officers, and firefighters. 29 U.S.C. §§ 623(j), 630(f); *Madigan*, 692 F.3d at 621. The ADEA also does not permit reverse discrimination claims, *see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593 (2004), or claims by employees under age 40. 29 U.S.C. §

631(a). There are no such limitations for § 1983 equal protection claims.

In light of *Kimel*, and in spite of the fact that ". . . . Congress certainly intended to provide a remedy for age discrimination against state employers when it amended the ADEA in 1974," *Mustafa v. State of Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 956 (D. Neb. 2002), the practical effect of precluding § 1983 claims is the elimination of a federal damages remedy against state actors because such claims are barred by Eleventh Amendment immunity. "Permitting total preemption such that no federal forum is available appears incompatible with the purpose of section 1983 and Congress' creation of a remedial scheme to address age discrimination in the ADEA." *Id.* Thus the court in *Mustafa* was "accordingly reluctant to find the ADEA impliedly repeals all section 1983 claims for age discrimination because implied repeal would eliminate the availability of a federal forum merely because the litigant is a state employee." *Id.*[6]

---

[6] The same reasoning counsels rejection of Petitioners' belated argument that the availability of a claim for age discrimination by "high-level policymakers and government attorneys" such as Levin, among other state employees exempt from ADEA coverage, but covered by the Government Employee Rights Act (GERA), further demonstrates Congress' intent to preclude § 1983 equal protection claims against workplace age bias. *See* Pet. Br. at 30-34. *Kimel* surely applies to GERA age discrimination claims and the same differences between § 1983 equal protection age discrimination claims and the ADEA exist between § 1983 equal protection age discrimination claims and GERA.

E. Unlike Rights Enforceable Under Title VII And The ADEA, The Rights Created By The FLSA Are Not Based On Rights Also Guaranteed By The Constitution.

The court below candidly acknowledged that every other circuit court that has considered the issue presented here has held that the ADEA does not permit constitutional claims pursuant to § 1983, "largely" relying on the reasoning of the U.S. Court of Appeals for Fourth Circuit in *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989). *Madigan*, 692 F.3d at 616. As pointed out in *Mummelthie v. City of Mason City, Iowa*, 873 F.Supp. 1293, 1323, (N.D. Iowa 1995), *Zombro* "looked to the FLSA to determine whether the ADEA was the exclusive federal remedy for age discrimination in employment, finding that the FLSA provisions incorporated into the ADEA had been interpreted to provide an exclusive remedy."

As the court below also pointed out, however, reliance on Congress' incorporation of the FLSA's remedial scheme into the ADEA to hold that Congress intended to preclude a § 1983 constitutional remedy for age discrimination is completely misplaced. It is "a perplexing argument because the cases which have found the FLSA to be an exclusive remedy do not (and, in fact, cannot) address constitutional claims" because "[u]nlike Title VII and the ADEA, the rights created by the FLSA are not based on rights also guaranteed by the constitution." *Madigan*, 692 F.3d at 620. This

conclusion does no violence to the notion that the FLSA is the sole remedy for violation of rights created by the FLSA and, similarly, that the ADEA is the sole remedy for violation of ADEA rights. It means merely that § 1983, which provides a remedy for constitutional violations, "cannot be used as an alternate mechanism to assert violation of the ADEA's provisions against states." *Mustafa*, 196 F. Supp. 2d at 956 n. 13.

In *Zombro*, the leading case holding that the ADEA is the exclusive federal remedy for age discrimination in employment, the majority found that "§ 1983 and ADEA remedies could not coexist, because allowing a § 1983 claim to proceed would allow a plaintiff to bypass the detailed and comprehensive remedial scheme Congress established in the ADEA." *Mummelthie*, 873 F.Supp. at 1327. However, as pointed out in *Mummelthie*, "Congress established the remedial scheme of the ADEA *to vindicate rights secured by the ADEA*, not to vindicate rights secured by the Constitution," *id* (emphasis in original), therefore, "there is no bypass of the ADEA when § 1983 is used to vindicate federal constitutional claims of age discrimination." *Id.* Judge Murnaghan, concurring in part and dissenting in part in *Zombro*, 868 F.2d at 1373, put it more succinctly: The "ADEA does not purport to provide a remedy for a violation of constitutional rights. Instead, it provides a mechanism to enforce only the substantive rights created by the ADEA itself."

Thus, the dissent in *Zombro* rejected the majority's conclusion that Congress could not have intended to preserve a § 1983 remedy for age discrimination because doing so would undermine the ADEA enforcement mechanism it created:

> It is up to Congress, not this Court, to balance the risks and benefits inherent in allowing alternatives to co-exist in the fight against discrimination. In the context of Title VII, Congress clearly believed that the need to retain a variety of methods to combat discrimination outweighed the risk that multiple remedies would undermine Title VII's comprehensive enforcement mechanism. Nothing indicates that Congress intended to strike a different balance in enacting the ADEA.

Id. (internal citations omitted) (Murnaghan, J., concurring in part and dissenting in part). Moreover, in *Kimel*, this Court declared that "it is clear that the ADEA cannot be understood as responsive to, or as designed to prevent, unconstitutional behavior." 528 U.S. at 86.

The ADEA, therefore, is not the exclusive federal remedy for age discrimination in employment because even if this Court were to find that the ADEA provides the sole remedy for violation of its

statutory provisions, such a conclusion does not preclude distinct *constitional* claims under § 1983.[7]

II. PERMITTING PUBLIC EMPLOYEES TO CHALLENGE WORKPLACE AGE BIAS UNDER § 1983 AND THE EQUAL PROTECTION CLAUSE WOULD NOT UNDERMINE FEDERAL STATUTORY PROTECTIONS AGAINST AGE DISCRMINATION.

A central premise of Petitioners' argument, that "the ADEA's remedial regime displaces respondent's § 1983 claims," is that "competing claims under § 1983 would upend a comprehensive federal regime targeting the same harm." Pet. Br. at 10. Available evidence and common sense point decisively to the contrary.

Neither private nor government enforcement of the ADEA (or the GERA, Government Employee Rights Act of 1991, 42 U.S.C. §§ 2000e-16a through 2000e-16c (GERA)) on behalf of state employees is robust enough to plausibly affirm the notion (or justify the metaphor) that they constitute an "applecart" prone to being "upend[ed]" if § 1983 equal protection age discrimination claims are allowed. Rather, to the extent empirical data exists on this question, and to the degree a fair assessment of probabilities is feasible, the data shows that state

---

[7] This is so whether the ADEA is considered in combination with the GERA, as Petitioners urge, or on its own, as it should be, being a statute wholly separate from and independent of the GERA.

employers face negligible risk of accountability for acts of age bias under the ADEA (or the GERA) and further, that other public employees have little incentive to invoke § 1983 instead of the ADEA (or the GERA).

Lacking other options, state employees should have the choice to rely on longstanding rights under the Fourteenth Amendment. Non-state public employees, however, face no barrier like *Kimel*—impeding their reliance on the ADEA. Hence, there is no realistic prospect of their often asserting far more difficult claims under § 1983. Thus, recognizing a 1983 equal protection claim for age discrimination does not portend significant additional litigation risks, or costs for public employers, or disruption of a delicate structure of robust statutory protection from age discrimination for older state employees.

A. Due To *Kimel*, Private Enforcement Of Federal Statutory Age Discrimination Protections For State Employees Is Quite Limited.

Shortly after *Kimel*, the EEOC acknowledged the dramatic limitation on private enforcement of the ADEA that the decision represented, and accordingly, the Commission's increased responsibility for protecting state employees: "The effect of *Kimel* is effectively to make EEOC the only entity that can sue state governments for age discrimination in federal court." EEOC, "The 2000s: Charting A Course for the 21st Century,"

http://www.eeoc.gov/eeoc/history/35th/2000s/index.html (statement issued in conjunction with the 35th Anniversary of the EEOC, and reported on the "EEOC 35th Anniversary" webpage). Moreover, while the *Kimel* majority expressed confidence that its decision did "not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers," because "[s]tate employees are protected by state age discrimination statutes," 528 U.S. at 91, the "practical reality of *Kimel*" is otherwise: *i.e.*, "relevant state laws are a patchwork of uneven protections that are generous in some locales and stingy in others." Carlton J. Snow, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section III Collective Agreements and Individual Contracts Employment in Labor Law*, 50 AM J. COMP. L. 319, 344 (Fall 2002). [8]

A review of available sources – such as reported decisions in the most common electronic legal databases, Lexis and Westlaw, and data collected by the EEOC — confirms a low overall level of private ADEA enforcement activity in federal

---

[8] This "patchwork" also impedes reliance on the ADEA in actions brought in state courts: "In those states that provide no meaningful remedy for age discrimination under state law, the absence of a state remedy may actually provide the justification for cutting off the federal ADEA remedy in a state forum." Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New "Federalism" Era*, 22 BERKELEY J. EMP. & LAB. L. 99, 116 (2001).

courts on behalf of state employees since issuance of the *Kimel* decision. This fact rebuts Petitioners' claims that the ADEA (whether on its own or together with the GERA) constitutes a cohesive scheme of protection from age discrimination that Congress must have intended to preclude § 1983 equal protection claims. While it is hard to definitively infer causation from such data, the data strongly suggest that *Kimel* plays a major, possibly decisive, role in discouraging private federal statutory age discrimination enforcement.

Searches for reported state employee ADEA (and GERA age bias) decisions since January 11, 2000 in Lexis and Westlaw produced less than 100 results, or an average of less than seven cases per year.[9] A majority of these decisions involve ADEA claims for monetary relief only, that courts dismissed with prejudice, either via a motion to dismiss or at summary judgment, based on *Kimel*. Many of these claims, at least a solid plurality, were brought by pro se litigants who may have been unaware of *Kimel*'s preclusive effect on such litigation.

---

[9] Undersigned counsel conducted these searches, which obviously can be done in various ways, using search terms to identify the ADEA (and/or the GERA) mentioned in the same paragraph as "state employee" or "state employees" in decisions reported since January 11, 2000. For instance using Lexis, such a search might be done as follows: {ADEA /p "state employee" & date after 1/1/2000} and {GERA /p "state employee" & date after 1/1/2000}. The GERA results were screened further to identify age bias cases, and both sets of results were reviewed to identify instances of private age discrimination enforcement.

Plainly, an average of less than seven reported ADEA (and GERA) cases per year since *Kimel* falls far short of a robust private enforcement regime on behalf of state employees. Logic suggests numerous reasons for this pattern, such as the lack of a damages remedy for emotional distress under the ADEA, even before *Kimel*. In any event, the data indicates that a § 1983 equal protection claim for age discrimination is not at all likely to "upend" the metaphorical applecart, but rather, at most, that it will allow a modest rise in private enforcement activity.

B. EEOC Enforcement Of Federal Statutory Age Discrimination Protections For State Employees Is Minimal.

In 2006, the EEOC declared itself "uniquely positioned" to address age discrimination by state employees, because the agency "can file ADEA suits against state entities and obtain monetary relief, whereas private litigants are limited by sovereign immunity to obtaining only injunctive relief in such cases." EEOC, "Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission," March 2006, at section I.A. (citing *Kimel*) *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.efc. Nevertheless, available records show that in nearly thirteen years since the *Kimel* decision, the EEOC has reported suing only seven

state employers under the ADEA.[10] By contrast, in the thirteen years before *Kimel*, the EEOC sued approximately three time as many state employers.[11] This is inconsistent with the significant increase in ADEA charges received by the EEOC over roughly the same period: from 16,008 in fiscal year 2000 to 22,857 in fiscal year 2012.[12] That record demonstrates that EEOC age discrimination enforcement on behalf of covered state employees is inadequate. It belies Petitioners' claim that Congress intended the EEOC to maintain an exclusive regime of federal statutory age discrimination enforcement, and Petitioners' further assertion that the EEOC can be relied on, under reasonably foreseeable conditions, to successfully manage such a task.

Nor is the trickle of EEOC age discrimination enforcement activity on behalf of state employees likely to swell any time soon. For instance, the EEOC recently released Strategic Enforcement Plan" highlights a variety of priorities, but these do

---

[10] This estimate draws on EEOC press releases available on the Commission's website, *see* www.eeoc.gov/eeoc/newsroom/index.cfm, and analysis of the results of searches in electronic legal databases: Lexis {search: EEOC/p "state employee" & date after 1/1/2000} and Westlaw {search: "EEOC v." /200 ADEA and after 1-10-2000}.

[11] This estimate is based on analysis of the results of the same searches for the period 1/1/1987 through 12/31/1999.

[12] Age Discrimination in Employment Act, FY 1997-FY 2012, EEOC, AgeDiscriminationwww.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

not include the problem of age discrimination against state employees unable to secure monetary relief in private enforcement actions. *See* "U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016" (approved Dec. 17, 2012) available at http://www.eeoc.gov/eeoc/plan/sep.cfm. A key factor seriously compromising the agency's ability to pursue with vigor potential areas of its enforcement jurisdiction is the cutback by Congress in agency resources in recent years. *Id.* at 3 ("Between FY 2000 and 2008, EEOC staffing levels and funding dropped nearly 30 percent. An infusion of resources in 2009 allowed for some rebuilding of capacity, but that was quickly stalled when funding was reduced and hiring freezes were implemented in FY 2011 and FY 2012."). It would be illogical in the extreme for this Court to conclude, at the very time Congress is limiting EEOC resources needed to combat age discrimination under federal statutes, that Congress intended such laws to strip victims of workplace age bias remedies available to them for nearly 100 years under the Civil Rights Act of 1871 and the Equal Protection Clause.

Petitioners also stress that the EEOC plays an important role in carrying out Congress' "preference for informal conflict resolution and voluntary compliance" under the ADEA by implementing the statutory directive to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Pet Br. at 22 (quoting 29 U.S.C. § 626(b)).

Petitioners first cite the fact that "the ADEA affords the EEOC an initial uninterrupted period within which to contact the employer and resolve the dispute informally . . . ." *Id.* at 22. Among the steps EEOC takes at this stage is to offer parties voluntary mediation. *See* EEOC, "Mediation," www.eeoc.gov/employees/mediation.cfm. But without any prospect of obtaining a monetary recovery in litigation, state employees who are charging parties – unlike private-sector or local government employees – have no means to persuade their employers to agree to any such relief. For the same reason, a state employee's capacity to convince a state employer to agree to declaratory or injunctive relief also is drastically reduced.

Charges of discrimination that result in a finding of probable cause that a violation has occurred typically lead to conciliation efforts by the EEOC. *See* e.g., EEOC, "Resolving a Charge," www.eeoc.gov/employers/resolving.cfm. Yet state employees face similar barriers to successful outcomes from conciliation as they do in earlier EEOC efforts at informal conflict resolution. Because state employers are not subject to an award of monetary relief in litigation, due to *Kimel*, they have no incentive to provide any such relief in conciliation, and little incentive to agree to meaningful injunctive or declaratory relief. Thus, although informal dispute resolution efforts by the EEOC in state employee cases may ultimately succeed in avoiding litigation, such efforts are very unlikely to bring about meaningful relief for victims of age discrimination. Any such relief is likely to be

far less than in cases of comparable severity involving private or non-state public employees.

Finally, to the extent there is any serious possibility of favorable results of informal dispute resolution processes coordinated by the EEOC in state employee ADEA (or GERA age bias) cases, such prospects would not be materially lessened by the possibility of charging parties litigating parallel § 1983 equal protection age discrimination claims. This is so because of the sheer difficulty of prevailing under § 1983, a fact that Petitioners acknowledge. It follows that recognizing a right for state employees to assert § 1983 age discrimination claims would not cause appreciable harm to the ADEA's (or GERA's) enforcement scheme.

C. The Availability of Monetary Relief And The Greater Ease of Proving Age Discrimination For Non-State Public Employees Under The ADEA and GERA Means Such Employees Are Unlikely To Use A § 1983 Equal Protection Claim to "Bypass" Federal Statutory Age Discrimination Claims and Processes.

While this case does not directly implicate the rights of non-state public employees, it does so indirectly. In an attempt to boost their case against state employee constitutional claims challenging age bias, Petitioners offer speculation regarding "significant harms" likely to result from recognizing

a right for non-state public employees to challenge age bias under § 1983 and the Fourteenth Amendment. Pet. Br. at 10. These claims are unpersuasive, especially given Petitioners' discussion of the steep challenges facing plaintiffs advancing such claims.

At some length, Petitioners explain the enormous difficulty facing most plaintiffs in proving age discrimination liability in § 1983 equal protection cases. *See id.* ("it is difficult to prevail ultimately on age discrimination claims under the Equal Protection Clause"); *id.* at 38-42 (section of brief contending "The Equal Protection Clause Offers Little Likelihood of Success on Age Discrimination Claims . . ."). Petitioners acknowledge that "equal protection claims for alleged age discrimination, like respondent's here, are particularly limited by the 'relaxed' standard against which they are judged." *Id.* at 39-40 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam)). Further, Petitioners note that in the Equal Protection Clause context, "an age classification is presumptively rational" and thus "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." *Id.* at 40 (quoting *Kimel*, 528 U.S. at 83-84, 84-86.). It stands to reason that non-state public employee complainants who can assert claims for relief based on more favorable terms under the ADEA are unlikely to rush to embrace the strategy of suing under the Equal Protection Clause.

Without empirical support, Petitioners also assert that age bias suits by non-state public employees asserting § 1983 equal protection claims will "[i]mpose [s]ubstantial [c]osts on [p]ublic [e]mployers." *Id.* at 38. Petitioners rely on vague allegations that such suits necessarily involve "high discovery costs" and a serious "threat of punitive damages." *Id.* Yet Petitioners fail to explain why this supposed threat (or even the threat of compensatory damages, which are unavailable to any ADEA plaintiff) is so great when in the same breath they characterize § 1983 equal protection age bias claims as so difficult to win. As to other supposed evidence of harm, Petitioners identify nothing substantial beyond that which also applies equally to non-state public employee ADEA (or GERA) age discrimination claims: *e.g.*, that such claims "readily survive motions to dismiss," *Id.* at 10; or that in some instances, "discovery costs may approach or exceed the potential damages recovery." *Id.* at 42.

CONCLUSION

For the reasons set forth above, Amici Curiae urge the Court to affirm the judgment of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANNA RICH
NATIONAL SENIOR
CITIZENS LAW CENTER
1330 Broadway, Ste 525
Oakland, CA 94612
Tel. (510) 663-1055
arich@nsclc.org

Counsel for Amici Curiae
National Senior
Citizens Law Center

THOMAS OSBORNE*
DANIEL KOHRMAN
LAURIE MCCANN
**Counsel of Record*
AARP FOUNDATION
LITIGATION

MELIVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2066
tosborne@aarp.org

Counsel for Amici Curiae
AARP

August 9, 2013

AMICUS CURIAE BRIEF

AUG 2 - 2013

No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, *et al.*,
Petitioners,
v.
HARVEY N. LEVIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JUDITH A. SCOTT
1800 Massachusetts Ave., NW
Washington, DC 20036

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
MATTHEW J. GINSBURG
Counsel of Record
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Alaska v. EEOC, 564 F.3d.1062 (9th Cir. 2009)	10
Bell v. Hood, 327 U.S. 678 (1946)	7
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)	7
City of Boerne v. Flores, 521 U.S. 507 (1997)	4, 8, 9, 10,16
Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)	11
Fitzgerald v. Barnstable School Comm., 555 U.S. 246 (2009)	*passim*
General Dynamic Land Systems, Inc. v. Cline, 540 U.S. 581 (2004)	12
Gregory v. Ashcroft, 501 U.S. 452 (1991)	9
Henley v. Brown, 686 F.3d 634 (8th Cir. 2012)	17
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)	*passim*
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	17
Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011)	10

TABLE OF AUTHORITIES—Continued

Page

Levin v. Madigan, No. 07 C 4765, 2011 U.S. Dist. LEXIS 74475 (N.D. Ill., July 12, 2011) 2

Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012) 3, 15, 16

Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 9

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 15

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) 7

Preiser v. Rodriguez, 411 U.S. 475 (1973) 15

Ranchos Palos Verdes v. Abrams, 544 U.S. 113 (2005) 15

Smith v. Metropolitan Sch. Dist. Perry Twp., 128 F.3d 1014 (7th Cir. 1997) 13

Smith v. Robinson, 468 U.S. 992 (1984) 5, 7, 15, 16

Vance v. Bradley, 440 U.S. 93 (1979) 9, 11

Zombro v. Baltimore City Police Department, 868 F.2d 1364 (4th Cir. 1989) 3, 16, 17

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND RULES:

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*
- 29 U.S.C. § 623(a)(1) 9
- 29 U.S.C. § 623(a)-(c) 13
- 29 U.S.C. § 623(j) 12
- 29 U.S.C. § 630(b) 13
- 29 U.S.C. § 630(f) 2, 7, 12
- 29 U.S.C. § 631(a) 12
- 29 U.S.C. § 631(c) 12

42 U.S.C. § 1983 ..... *passim*

Government Employee Rights Act of 1991, 42 U.S.C. §§ 2000e-16a – 2000e-16c
- 42 U.S.C. § 2000e-16b(a)(2) 10

Sup. Ct. R. 14.1(a) 10

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] The AFL-CIO, through its affiliate unions, represents several million state and local government employees and thus has a strong interest in matters that affect these workers' employment rights, including the right to be free of unconstitutional age discrimination.

The Service Employees International Union (SEIU) represents over 2.1 men and women working in health care, property services, and public services. SEIU is deeply committed to principles of equal opportunity and nondiscrimination, including the right of its members who work for state and local governments to be free from unconstitutional discrimination on the basis of age.

---

[1] Counsel for the petitioners and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Harvey Levin was terminated from his position as an Illinois Assistant Attorney General in 2006 when he was 61 years old. Levin filed suit under 42 U.S.C. § 1983 against Illinois Attorney General Lisa Madigan in both her official and individual capacities, the State of Illinois, the Office of the Illinois Attorney General, as well as several individual defendants who are the petitioners in this case, alleging, *inter alia*, that he was terminated on the basis of his age in violation of the Equal Protection Clause of the Fourteenth Amendment.

The defendants successfully argued to the district court that Levin was excluded from coverage under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, as an "appointee on the policymaking level." *Levin v. Madigan*, No. 07 C 4765, 2011 U.S. Dist. LEXIS 74475, *25, *34 (N.D. Ill., July 12, 2011) (quoting 29 U.S.C. § 630(f)). In tension with their principal argument, the individual defendants also asserted qualified immunity from Levin's equal protection claim on the ground that the ADEA provides the exclusive remedy for age-related discrimination claims by public employees and, therefore, Levin failed to state a viable constitutional claim under § 1983. *Id.* at *35-*41. The district court rejected this claim, concluding that "the ADEA does not preclude a § 1983 suit for age discrimination" and that the individual defendants were not entitled to qualified immunity because "a reasonable official would have known that the official was violating a clearly established constitutional right." *Id.* at *36-*37.

The individual defendants filed an interlocutory appeal of the district court's denial of qualified immunity, renewing their argument that they were entitled to qualified immunity because the ADEA precluded Levin's constitutional claim. The court of appeals conducted an extensive analysis of the issue and, while recognizing that "[a]ll other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims," *Levin v. Madigan*, 692 F.3d 607, 616 (7th Cir. 2012) (citing *Zombro v. Baltimore City Police Department*, 868 F.2d 1364 (4th Cir. 1989), and cases following *Zombro*), ultimately agreed with the district court that "the ADEA is not the exclusive remedy for age discrimination in employment claims," *id.* at 622.

The individual defendants then filed a petition for a writ of certiorari seeking review of the court of appeals' decision. The Court granted the writ of certiorari on the question whether "state and local government employees may . . . bring[] age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983." Pet. Br. i.

SUMMARY OF ARGUMENT

Congressional intent is the touchstone in determining whether a statutory enactment precludes the availability of a § 1983 claim for a constitutional violation. All parties agree that neither the statutory text nor the legislative history of the ADEA indicate Congress's intent to preclude age-related equal protection claims brought under § 1983. And, it is especially unlikely that Congress would have intended to

displace the category of constitutional claims at issue in this case because Levin is an "appointee on the policymaking level" who is excluded from ADEA coverage altogether.

Moreover, petitioners' argument that Congress intended to preclude age-related equal protection claims brought pursuant to § 1983 when it enacted the ADEA is foreclosed by this Court's decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), which holds that "the ADEA . . . 'cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'" *id.* at 86 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). Although *Kimel* concerned State sovereign immunity under the Eleventh Amendment, this Court's negative answer to the question presented in that case – whether there was "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted [in the ADEA] to that end," *id.* at 81 (quoting *City of Boerne*, 521 U.S. at 520) – is dispositive of the question presented here – whether "the contours of [the] rights and protections" provided by the ADEA and the Equal Protection Clause "diverge in significant ways." *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 252-53 (2009).

A *de novo* comparison of the "rights and protections" provided by the ADEA and the Equal Protection Clause yields the same result. The ADEA and the Constitution differ in terms of the categories of age-related discrimination claims covered, who may bring suit, and who may be held legally responsible for violations. Viewed as a whole, the ADEA's

"protections are narrower in some respects and broader in others" than the Equal Protection Clause, leading to the conclusion, as in *Fitzgerald*, that "[the statute] was not meant to be an exclusive mechanism for addressing [] discrimination . . . , or a substitute for § 1983 suits as a means of enforcing constitutional rights." *Id.* at 256-58.

The petitioners' emphasis on the ADEA's comprehensive remedial regime is unavailing for the basic reason that that remedial regime applies only to violations of the ADEA and not to the many categories of age discrimination claims that are not covered by the ADEA but that can be pleaded under the Equal Protection Clause. Likewise, the petitioners' contention that permitting constitutional claims for age-related discrimination will unleash a flood of litigation against public employers is overstated. Age-related decisions by public actors remain presumptively lawful under the Constitution, so a plaintiff who wishes to challenge such a decision must carry the heavy burden of proving that an allegedly unconstitutional age-related employment decision is not only unwise but irrational and arbitrary.

ARGUMENT

1. In determining whether a statutory enactment displaces a preexisting § 1983 claim for a constitutional violation, "[t]he crucial consideration is what Congress intended." *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 252 (2009) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

All agree that neither the text nor legislative histo-

ry of the ADEA contain any statement or other indication of congressional intent to foreclose § 1983 claims for age-related violations of the Equal Protection Clause. Indeed, this Court has previously strongly indicated that Congress did not consider the matter – and thus could not have intended to foreclose such claims – observing, upon an "examination of the ADEA's legislative record," that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 89 (2000)

This prior "conclusion[] regarding [lack of] congressional intent can be confirmed by [the] statute's context." *Fitzgerald*, 555 U.S. at 253. As this Court has explained,

> "In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Id.* at 252-53.

The rationale for this "significant divergence" rule is straightforward. Where a statute does not provide the same substantive rights and protections as the Constitution, this Court will "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection

claim," because, "[s]ince 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional . . . rights." *Smith*, 468 U.S. at 1012. "[T]here can be no doubt that § 1 of the Civil Rights Act [*i.e.*, 42 U.S.C. § 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978).

The interpretive rule against implied preclusion of § 1983 claims for constitutional violations is of special force in a case such as this one because the ADEA excludes Levin from its coverage altogether as an "appointee on the policymaking level." 29 U.S.C. § 630(f). It is thus exceedingly unlikely that Congress impliedly intended to preclude § 1983 claims like Levin's where, by doing so, it would deprive similarly-situated individuals of *any* statutory cause of action for age-related "official violation[s] of federally protected rights." *Monell*, 436 U.S. at 700-01. Indeed, "[e]ven if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction," *Smith*, 468 U.S. at 1012 n.15 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946), and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971); *id.*, at 400-406 (Harlan, J., concurring in judgment)), such that, even absent a cause of action under § 1983, Levin still could plead a claim for age-related discrimination directly under the Equal Protection Clause.

2. Moreover, this Court has previously determined that the contours of the rights and protections provided by the Equal Protection Clause and the ADEA *do* differ in significant ways. *Kimel* holds that "it is clear that the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" 528 U.S. at 86 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). Although *Kimel* concerned whether Congress lawfully abrogated the Eleventh Amendment in extending the ADEA to state employers, the Court's analysis fully answers the question presented by this case.

Kimel, like this case, involved claims of age discrimination brought against state employers, albeit under the ADEA rather than the Equal Protection Clause. 528 U.S. at 69-71. The state defendants contended that Congress had not lawfully abrogated sovereign immunity in extending the ADEA to the States. *Ibid.* Under established Eleventh Amendment jurisprudence, the validity of that defense turned on whether there was "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted [in the ADEA] to that end." *Id.* at 81 (quoting *City of Boerne*, 521 U.S. at 520).

This Court concluded that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the [ADEA]." *Id.* at 83. In reaching that conclusion, this Court reiterated its prior holding that "age is not

a suspect classification under the Equal Protection Clause," *ibid.* (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)), such that "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest," *ibid.* The ADEA, in contrast, "makes unlawful, in the employment context, *all* 'discrimination against any individual . . . because of such individual's age.'" *Id.* at 86 (quoting 29 U.S.C. § 623(a)(1)) (emphasis added). As a result, whereas "an age classification [by the State] is presumptively rational" under the Equal Protection Clause, *id.* at 84, "[u]nder the ADEA . . . the State's use of age is prima facie unlawful," *id.* at 87.

Although the *Kimel* decision used the Eleventh Amendment language of "congruence and proportionality," *id.* at 81, to determine whether "the ADEA [wa]s . . . designed to prevent[] unconstitutional behavior," *id.* at 86 (quotation marks omitted), there is no meaningful difference between that standard and the standard set forth in *Fitzgerald* that "[w]here the contours of [the] rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights," 555 U.S. at 252-53. *Kimel*'s holding that "the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'" 528 U.S. at 86 (quoting *City of Boerne*, 521 U.S. at 532), is therefore conclu-

sive as to the question presented here of whether the ADEA displaces claims brought under § 1983 for age-related equal protection violations.[2]

3. Even if this Court in *Kimel* had not already undertaken the relevant analysis, a *de novo* comparison of the ADEA and the Equal Protection Clause demonstrates that "[the] rights and protections

---

[2] Petitioners contend for the first time in their opening brief to this Court that the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. §§ 2000e-16a – 2000e-16c, forecloses § 1983 claims by ADEA-excluded "appointees on the policymaking level" like Levin. *See* Pet. Br. 30-34. That argument, which petitioners did not raise before the court of appeals or in their petition for a writ of certiorari and which is not within the scope of the question presented, has been waived. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). *See also Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) ("We do not normally consider a separate legal question not raised in the certiorari briefs.").

Moreover, to the extent that the GERA covers age discrimination claims it is subject to the same Eleventh Amendment analysis as the Court applied to the ADEA in *Kimel*, as the GERA provides a cause of action for age discrimination only by cross-referencing the substantive anti-discrimination provisions of the ADEA. *See* 42 U.S.C. § 2000e-16b(a)(2). And, because "when Congress enacted the GERA in 1991, it made no findings regarding discrimination against state employees at the policy-making level," *Alaska v. EEOC*, 564 F.3d 1062, 1077 (9th Cir. 2009) (en banc) (O'Scannlain, J., concurring in part and dissenting in part), GERA claims against state employers, like such claims under the ADEA, "cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86 (quoting *City of Boerne*, 521 U.S. at 532).

diverge in significant ways, [such that] it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Fitzgerald*, 555 U.S. at 252-53. In particular, the rights and protections provided by the ADEA and the Equal Protection Clause differ in terms of what categories of age-related claims are covered, who may bring suit, and who may be held legally responsible for violations.

As we have already explained, "[t]he [ADEA], through its broad restriction on the use of age as a discriminating factor, prohibits *substantially more* state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 528 U.S. at 86 (emphasis added). At the same time, the ADEA also "*exempts* from its restrictions several activities that may be challenged on constitutional grounds." *Fitzgerald*, 555 U.S. at 257 (emphasis added).

In particular, the Equal Protection Clause broadly covers claims for discrimination based on age whenever "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance*, 440 U.S. at 97. That is because "[t]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

As a result of the "direction that all persons similarly situated should be treated alike," *ibid.*, the Equal Protection Clause permits any claim challenging irrational age-related discrimination by a state actor. This includes, for example, reverse age discrimination, a category of claim that is not permitted by the ADEA. *See General Dynamic Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004). Similarly, the Equal Protection Clause permits claims for age-related discrimination by employees who are younger than 40, while the ADEA limits its statutory protections "to individuals who are at least 40 years of age." 29 U.S.C. § 631(a).

Also unlike the ADEA, neither § 1983 nor the Equal Protection Clause sets any limit on the extent of protection or remedies available for age-related discrimination based on the particular occupation of the public employee who brings suit. In contrast, the ADEA broadly excludes from coverage elected officials, their staff, and, as is especially pertinent to this case, "appointee[s] on the policymaking level" like Levin. 29 U.S.C. § 630(f). *See, e.g.*, *Gregory*, 501 U.S. at 467 ("appointed state judges" are excluded from ADEA coverage as "'appointee[s] on the policymaking level'").

The ADEA also permits employers, within statutorily-prescribed limits, to set maximum hiring ages and mandatory retirement ages for firefighters and law enforcement officers, 29 U.S.C. § 623(j), and to set mandatory retirement ages for certain bona fide executives and high-level policymakers, § 631(c). The Equal Protection Clause, in contrast, does not contain similar safe harbors for age discrimination against these categories of employees.

Finally, the ADEA and the Equal Protection Clause differ with regard to who may be held liable for age-related discrimination. An employee may sue an employer, employment agency, or labor organization under the ADEA, 29 U.S.C. § 623(a)-(c), but may not sue an individual defendant. In contrast, under § 1983, an employee may sue any "*person* who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983 (emphasis added), including individual defendants.

A state or local employer, on the other hand, "cannot be held liable under § 1983 on a *respondeat superior* theory" for unconstitutional age-related discrimination by its employees. *Monell*, 436 U.S. at 691. Rather, a plaintiff proceeding against a public employer must prove that the discrimination occurred as a result of a government custom, policy, or practice. *Ibid.* In contrast, under the ADEA, an employer is vicariously liable for age discrimination by its managerial and supervisory employees. *See* 29 U.S.C. § 630(b) (defining "employer" to include "any agent" of a covered employer). *See also Smith v. Metropolitan Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1024 (7th Cir. 1997) ("[T]he actual reason for the 'and any agent' language in the definition of 'employer' was to ensure that courts would impose *respondeat superior* liability upon employers for the acts of their agent." (quotation marks and citation omitted)).

In sum, as in *Fitzgerald*, the ADEA's "protections

are narrower in some respects and broader in others" than the Equal Protection Clause, leading to the conclusion that "Congress did not intend [the ADEA] to preclude § 1983 constitutional suits." 555 U.S. at 256.

4. The Petitioners' heavy reliance on the fact that the ADEA "creates a comprehensive remedial regime" misses the essential point that the ADEA remedial scheme is *not* designed to "displace[] competing claims under § 1983." Pet. Br. 11 (indentation, bold, and initial capital letters omitted). The substantive rights and protections provided by the ADEA are not coextensive with those provided by the Equal Protection Clause, and thus the existence of the ADEA's remedial regime for the claims created by the statute provides no evidence of congressional intent to displace § 1983 claims for age-related constitutional violations.

While the ADEA does create a comprehensive remedial regime for *violations of the ADEA*, that statute provides no remedy at all for many age-related equal protection violations. For this reason, the mere existence of the ADEA's comprehensive remedial regime says nothing about whether Congress intended to displace § 1983 claims for age-related constitutional violations. Rather than focus on the mechanics of the ADEA's remedial scheme, the proper analysis in this case concerns whether "the contours of . . . rights and protections [provided by the ADEA and the Equal Protection Clause] diverge in significant ways." *Fitzgerald*, 555 U.S. 252-53.

While it is true that many of this Court's decisions compare remedies rather than substantive "rights

and protections," *ibid.*, the claims at issue in each of these prior cases are easily distinguishable from those presented here. As the court of appeals correctly recognized, "the plaintiffs in [*Middlesex County Sewerage Authority v. National*] *Sea Clammers* [*Association*, 453 U.S. 1 (1981),] and *Ranchos Palos Verdes* [*v. Abrams*, 544 U.S. 113 (2005)] sought to assert federal *statutory* rights under § 1983," *Levin v. Madigan*, 692 F.3d 607, 612 (7th Cir. 2012) (emphasis in original), in contrast to the § 1983 claim for a constitutional violation that Levin presents here. "[A] comparison of the rights and protections of the statute and those existing under the Constitution," *Fitzgerald*, 555 U.S. at 252-53, was, therefore, unnecessary in *Sea Clammers* and *Ranchos Palos Verdes* because the plaintiffs' § 1983 claims in those cases merely "s[ought] damages under § 1983 *for violation of a statute*," *Levin*, 692 F.3d at 611 (emphasis added), rather than for violation of a constitutional right.

Although *Smith v. Robinson*, 468 U.S. 992 (1984), presents the converse situation from *Sea Clammers* and *Ranchos Palos Verdes*, it too is easily distinguishable from this case. In *Smith*, this Court found that "Congress intended [plaintiffs] with constitutional claims . . . to pursue those claims through [a] carefully tailored administrative and judicial mechanism set out in [a] statute." 468 U.S. at 1009. *See also Preiser v. Rodriguez*, 411 U.S. 475 (1973). "[A] comparison of the rights and protections of the statute and those existing under the Constitution," *Fitzgerald*, 555 U.S. at 252-53, was thus unnecessary in *Smith* because, rather than creating new substantive rights and protections, the

statute in that case merely provided an "administrative and judicial mechanism," *Smith*, 468 U.S. at 1009, to enforce the same constitutional protection that was the object of the plaintiff's parallel § 1983 claim. As the court of appeals in this case correctly explained, "in *Smith*, it was more than just the comprehensive remedial scheme that convinced the Court that the [statute] is an exclusive remedy," rather the key factor was that the statute "provide[d] a remedy *for violation of constitutional rights*." *Levin*, 692 F.3d at 619 (quoting *Zombro*, 868 F.2d at 1373 (Murnaghan, J., dissenting)) (emphasis added).

In this case, Levin's § 1983 claim seeks to vindicate his constitutional rights under the Equal Protection Clause, not his statutory rights under the ADEA. This case is not, therefore, governed by *Sea Clammers* or *Ranchos Palos Verdes*. And, in contrast to the statute at issue in *Smith*, the ADEA "cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86 (quoting *City of Boerne*, 521 U.S. at 532). Nor is there any evidence Congress intended to require plaintiffs with age-related equal protection claims to pursue those claims through the ADEA's "administrative and judicial mechanism," *Smith*, 468 U.S. at 1009, since, in fact, "the ADEA prohibits very little conduct likely to be held unconstitutional," *Kimel*, 528 U.S. at 88. Rather, as in *Fitzgerald*, the fact that the ADEA's "protections are narrower in some respects and broader in others" "lends . . . support to the conclusion that Congress did not intend [the ADEA] to preclude § 1983 constitutional suits" of the sort presented by Levin in this case. 555 U.S. at 256.

Finally, the petitioners' contention that permitting § 1983 claims for age-related Equal Protection Clause violations will have "significant, adverse consequences" for public employers who must defend against such suits, Pet. Br. 20, is greatly overstated. "Government employees who are victimized by the types of discrimination covered by Title VII have a far greater incentive than age discrimination victims to bring their claims under the equal protections clause . . . because the types of discrimination covered by Title VII are subject to much closer scrutiny than age discrimination claims when challenged on equal protection grounds." *Zombro*, 868 F.2d at 1376 (Murnaghan, J., dissenting). Yet, despite clear post-Title VII precedent permitting constitutional claims for race and sex discrimination under § 1983, *see Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Henley v. Brown*, 686 F.3d 634, 642 (8th Cir. 2012), there has been no flood of such suits against public bodies. Likewise, "the vast majority of government workers who assert age discrimination claims will choose to rely on ADEA and its prescribed enforcement mechanism," *Zombro*, 868 F.2d at 1376 ((Murnaghan, J., dissenting), because, as petitioners admit, the few plaintiffs who do plead "equal protection claims for alleged age discrimination are unlikely to succeed in the end," Pet. Br. 20, due to the limited substantive protections the Constitution provides to individuals based upon their age.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

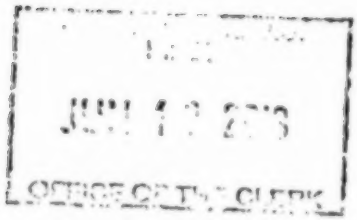
Respectfully submitted,

JUDITH A. SCOTT
1800 Massachusetts Ave., NW
Washington, DC 20036

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
MATTHEW J. GINSBURG
Counsel of Record
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS



No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, ET AL.,

Petitioners,

v.

HARVEY N. LEVIN,

Respondent.

On Writ Of Certiorari to the
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE COUNCIL OF STATE GOVERNMENTS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS J. DAVIS
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker
Chicago, IL 60601
bjmurray@jonesday.com
(312) 782-3939

Counsel for Amici Curiae

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. STATE AND LOCAL GOVERNMENT, ONE OF THE NATION'S LARGEST JOB SECTORS, WILL SUFFER UNIQUE, UNAFFORDABLE FINANCIAL BURDENS IF THE SEVENTH CIRCUIT'S DECISION STANDS 5

A. The EEOC's Mediation, Settlement Facilitation, and Conciliation Programs, Designed to Carry Out its Statutory Responsibilities, Are Successful, Popular Alternatives to Federal Court Litigation 6

B. Without Preemption, Government Employers Face Increased Federal-Court Litigation of Age Discrimination Claims, With Resulting Financial Harm 9

TABLE OF CONTENTS
(continued)

Page

II. IF THIS COURT REJECTS PREEMPTION, IT SHOULD AT LEAST CLARIFY THAT A § 1983 CLAIM IS NOT FUNGIBLE WITH CLAIMS UNDER THE ADEA 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Abel v. Auglaize County Highway Department,
276 F. Supp. 2d 724 (N.D. Ohio 2003) 14

Armour v. City of Indianapolis,
132 S.Ct. 2073 (2012)..... 20

Baker v. Chisom,
501 F.3d 920 (8th Cir. 2007) 12

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 19, 20

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 16

Bourdais v. New Orleans City,
485 F.3d 294 (5th Cir. 2007) 12

Burkhardt v. Lindsay,
811 F. Supp. 2d 632 (E.D.N.Y. 2011) 14

Carpenter v. Williams County, North Dakota,
618 F. Supp. 2d 1293 (D.N.D. 1985) 12

City of Hialeah, Florida v. Rojas,
311 F.3d 1096 (11th Cir. 2002)..... 11

Collard v. Kentucky Board of Nursing,
896 F.2d 179 (6th Cir. 1990) 12

Egerdahl v. Hibbing Community College,
72 F.3d 615 (8th Cir. 1995) 12

TABLE OF AUTHORITIES
(continued)

Page

Engquist v. Oregon,
553 U.S. 591 (2008) 18, 23

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 20, 22

Fratus v. DeLand,
49 F.3d 673 (10th Cir. 1995) 12

Gee v. Pacheco,
627 F.3d 1178 (10th Cir. 2010) 12

Gomez v. Randle,
680 F.3d 859 (7th Cir 2012) 11

Gray v. Lacke,
885 F.2d 399 (7th Cir. 1989) 12

Gross v. FBL Financial Services, Inc.,
129 S.Ct. 2343 (2009) 20

Heller v. Doe,
509 U.S. 312 (1993) 21

Hughes v. Vanderbilt University,
215 F.3d 543 (6th Cir. 2000) 12

Intel Corp. v. Advanced Micro Devices, Inc.,
542 U.S. 241 (2004) (Breyer, J., dissenting) 16

Kentucky v. Graham,
473 U.S. 159 (1985) 12

TABLE OF AUTHORITIES
(continued)

Page

Kimel v. Board of Regents,
528 U.S. 62 (2000) 12, 20

Knox v. Davis,
260 F.3d 1009 (9th Cir. 2001) 12

Koch v. Hose,
589 F.3d 626 (3d Cir. 2009) 11

Levin v. Madigan,
692 F.3d 607 (7th Cir. 2012) 2

Levin v. Madigan,
No. 07-C-4765, 2011 WL 2708341 (N.D. Ill. July 12, 2011) 14, 22

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976) 19

McCune v. City of Grand Rapids,
842 F.2d 903 (6th Cir. 1988) 11

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) ..... *passim*

Mummelthie v. City of Mason City,
873 F. Supp. 1293 (N.D. Iowa 1995) 15

Nordlinger v. Hahn,
505 U.S. 1 (1992) 19

Owens v. Okure,
488 U.S. 235 (1989) 11

TABLE OF AUTHORITIES
(continued)

Page

Patsy v. Board of Regents of Florida,
457 U.S. 496 (1982) 10

Price v. City of San Antonio,
431 F.3d 890 (5th Cir. 2005) 11

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 20

Shapiro v. New York City Department of Education, 561 F. Supp. 2d 413 (S.D.N.Y. 2008) 14

Shomo v. City of New York,
579 F.3d 176 (2d Cir 2009) 11

Siler v. Hancock County Board of Education,
510 F. Supp. 2d 1362 (M.D. Ga. 2007) 14

Small v. City of Belfast,
796 F.2d 544 (1st Cir. 1986) 12

Smith v. Wade,
461 U.S. 30 (1983) 13

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 20

Stalhut v. City of Lincoln,
145 F. Supp. 2d 1115 (D. Neb. 2001) 15

Sulik v. Taney County, Missouri,
393 F.3d 765 (8th Cir 2005) 12

TABLE OF AUTHORITIES
(continued)

Page

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 19

STATUTES & REGULATIONS

29 C.F.R. § 1601.20 8

29 C.F.R. § 1601.24 9

29 U.S.C. § 626 ..... 6, 7, 10, 11

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 2000e 10, 11

OTHER AUTHORITIES

Anne Noel Occhialino & Daniel Vail, *Why The EEOC (Still) Matters*, 22 Hofstra Lab. & Emp. L.J. 671 (2005) 9

Barbara T. Lindemann et al., Employment Discrimination Law 12-176 (5th ed. 2012) 13

Bethany Krajelis, *Group Reports On City Litigation Costs, Urges Constraint*, Chicago Daily Law Bulletin (July 28, 2011) 16

Christina Villacorte, *Group Says Los Angeles County, City Under Siege From Lawsuits*, L.A. Daily News (Apr. 13, 2013) 16

TABLE OF AUTHORITIES
(continued)

Page

Henry Goldman, *Legal Claims Add to New York City's Budget Woes*, Bloomberg Businessweek (Sept. 13, 2013) 13

Illinois In Poorest Fiscal Condition of All States, Chi. Tribune (June 21, 2012) 22

Jeremy Boren, *Lawsuits Add To Pittsburgh's Financial Woes*, Pitt. Tribune Review (April 8, 2006) 17

John P. Avlon, *Sue City*, Forbes (Jul. 14, 2009) 16

Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability For Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209 (2001) 13

Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F. L. Rev. 627 (2003) 7

Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost Of Electronic Discovery In Employment Litigation*, 14 Rich. J.L. & Tech. 9 (2008) 13, 16

Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 Pepp. Disp. Resol. L.J. 211 (2009) 15

TABLE OF AUTHORITIES
(continued)

Page

Sydney Cresswell & Michael Landon-Murray, *Assessing the Fiscal Impact of Lawsuits on New York State Municipalities* 7 (Oct. 2011), http://www.albany.edu/polis/research.shtml. 16

U.S. Bureau of Labor Statistics, Employment by Major Industry Sector, http://data.bls.gov/cgi-bin/print.pl/emp/ep_table_201.htm 5

U.S. Census Bureau, Government Employment & Payroll, http://www2.census.gov/govs/apes 5

U.S. Equal Employment Opportunity Commission, An Evaluation of the Equal Employment Opportunity Commission Mediation Program (Sept. 2000), http://eeoc.gov/eeoc/mediation/report/ index.html..... 8

U.S. Equal Employment Opportunity Commission, Age Discrimination in Employment Act FY 1997 – FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm. 9, 10

U.S. Equal Employment Opportunity Commission, EEOC Mediation Statistics FY 1999 through FY 2012, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm. 8

U.S. Equal Employment Opportunity Commission, Facts About Mediation, http://eeoc.gov/eeoc/ 7

TABLE OF AUTHORITIES
(continued)

Page

U.S. Equal Employment Opportunity Commission, Laws Enforced by EEOC, http://www.eeoc.gov/laws/statutes/index.cfm 10

U.S. Equal Employment Opportunity Commission, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm7, 8, 9

INTEREST OF AMICI CURIAE[1]

Established in 1935, the International Municipal Lawyers Association (IMLA) is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA is a nonprofit, nonpartisan professional organization with over 3,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys.

Since its founding, IMLA has served as a national, and now an international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law, through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional

---

[1]Pursuant to Rule 37.6, *amici curiae* and their counsel hereby represent that none of the parties to this case nor their counsel authored this brief in whole or part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief. The parties have filed blanket consents for the filing of amicus briefs in this case.

management of local governments throughout the world.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

Amici respectfully submit this brief to underscore the dangers posed by the Seventh Circuit's ruling in *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012) to state and municipal governments. Not only is the decision erroneous as a legal matter, as a practical matter it will, if allowed to stand, subject state and municipal employers to dramatically increased litigation costs and damages awards by eradicating crucial and time-honored barriers to suing these entities as employers. Indeed, the Seventh Circuit's approach would actually make it easier to sue these public-sector employers than their private-sector counterparts. The illegitimate expenses that such suits would impose are public ones that cash-strapped states and municipalities can ill afford, especially in the current economic climate.

Accordingly, *amici* ask the Court to reverse the judgment of the Seventh Circuit, or at least to clarify that constitutional age-discrimination suits cannot be used as substitutes for ADEA actions to avoid administrative exhaustion.

SUMMARY OF ARGUMENT

State and local governments are, collectively, one of the largest employers in the United States. Like

their private-sector counterparts, public-sector employees are protected against age discrimination by the ADEA. The ADEA requires, as a condition of its protections, that employees must first exhaust their claims before the EEOC. The EEOC, which is statutorily required to resolve age-discrimination claims informally, is very effective at this task. Through its mediation program, its efforts to facilitate private settlements, and conciliation of meritorious discrimination claims, the EEOC often can end discrimination cases quickly, inexpensively, and without the burdens of trial.

1. The Seventh Circuit's ruling that public employees may file § 1983 age discrimination claims against their employers, if affirmed, will eliminate the ADEA's administrative protections in many cases, and uniquely subject government employers to increased costs and burdens of federal litigation. Plaintiffs would have several reasons to eschew ADEA claims in favor of § 1983 claims, which EEOC does not have jurisdiction over.

First, § 1983 has a longer statute of limitations than the ADEA—in some cases over five years longer—meaning that plaintiffs with stale ADEA claims can revive such claims in federal court under § 1983. Second, § 1983 plaintiffs can indirectly sue state governments (by naming individual supervisors as defendants, who in turn are indemnified by the state for losses), or sue for punitive damages, neither of which are options in an ADEA suit. Third, plaintiffs who are seeking to force a quick settlement (which is not uncommon with municipal defendants) will not want to "waste time" before an agency. Fourth, some plaintiffs might simply choose to file

directly in federal court because several courts (erroneously) treat § 1983 claims and ADEA claims as fungible, meaning that there is no substantive disadvantage in filing § 1983 claims.

Whatever the reason, shunting age-discrimination claims from the EEOC to federal courts will create unique, additional litigation expenses for public employers. Federal lawsuits are considerably more expensive than administrative review. These litigation costs come at direct public expense, since money spent on lawsuits cannot be spent on public services. And in this economy, state and local governments cannot afford such increased burdens—burdens which will not be borne by any other employer.

2. At a minimum, if the Court were to affirm the Seventh Circuit's judgment, it should at least hold that § 1983 age-discrimination claims should not be subjected to heightened ADEA-style scrutiny, and thus should not be adjudicated using the burden-shifting *McDonnell Douglas* framework commonly used in ADEA cases. As this Court held long ago, constitutional age-discrimination claims are reviewed only for a rational basis. Thus, governmental action should be upheld if any "reasonably conceivable" set of facts would justify the action. Under rational basis review, the government need not articulate the actual reason for its actions, as hypothetical or conjectural reasons are sufficient. As a result, the plaintiff has the burden of negating all possible rational reasons for the government's actions.

The *McDonnell Douglas* test is incompatible with rational-basis review. That test places the burden on the employer to articulate its actual reasons for an

employment action, bases potential liability on whether that specific reason is true or false, and does not require the plaintiff to rebut all possible reasons for an action. The fundamental incompatibility between rational-basis review and *McDonnell Douglas* review is apparent in this very case, where the district court found that there were facially legitimate reasons to terminate Mr. Levin, but nonetheless allowed Mr. Levin's claims to go to trial because there was evidence casting doubt on one (but not all) of the Government's asserted justifications for his termination. If § 1983 claims are not preempted, then they should not be allowed to apply the lowered proof standards of the ADEA.

ARGUMENT

I. STATE AND LOCAL GOVERNMENT, ONE OF THE NATION'S LARGEST JOB SECTORS, WILL SUFFER UNIQUE, UNAFFORDABLE FINANCIAL BURDENS IF THE SEVENTH CIRCUIT'S DECISION STANDS.

State and local government employment is one of the largest employment sectors in the country, accounting for approximately 13% of the nation's total jobs.[2] The most recent available census data show that there are 14.6 million full-time state and local employees, and another 4.9 million part-time employees.[3] These employees, like their private-sector counterparts, have a remedy for age

---

[2] *See* U.S. Bureau of Labor Statistics, Employment by Major Industry Sector, *at* http://data.bls.gov/cgi-bin/print.pl/emp/ep_table_201.htm

[3] *See* U.S. Census Bureau, Government Employment & Payroll, *at* http://www2.census.gov/govs/apes (linking to summary table for "2011 State and Local Government").

discrimination in the ADEA. As a condition of that remedy, Congress requires that the EEOC be given an opportunity to administratively review, and attempt to resolve, employment disputes before employees can resort to federal court.

The EEOC is very effective at resolving discrimination claims at minimal expense to the parties involved, and without requiring the litigation costs and burden on judicial resources that federal litigation entails. Should the Seventh Circuit be affirmed, however, plaintiffs' attorneys and their public-sector employee clients will be able to flood the federal courts with ADEA-style claims, without ADEA-style preliminary exhaustion procedures that, in turn, would deprive public-sector employers, and only these employers, of the benefits of the ADEA while imposing all its burdens. Nothing in law or logic recommends this kind of inter-branch hostile takeover—vitiating key administrative procedures, provided for by Congress, through judicial fiat.

A. The EEOC's Mediation, Settlement Facilitation, and Conciliation Programs, Designed to Carry Out its Statutory Responsibilities, Are Successful, Popular Alternatives to Federal Court Litigation.

Under the ADEA, a party alleging age discrimination must file an administrative charge with the EEOC within 180 or 300 days (depending on the state) of the date on which the allegedly discriminatory act occurred. *See* 29 U.S.C. § 626(d)(1). The party may not file a civil action until at least 60 days after filing a charge. *Id.* § 626(d). The EEOC, upon receiving this charge, "shall promptly notify all persons named in such charge as

prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." *Id.* § 626(d)(2).

In order to fulfill its statutory mandate, the EEOC has created several processes through which it attempts to obtain binding resolutions to resolve charges of employment discrimination without the need for litigation. These methods "include mediation, settlement and conciliation." U.S. Equal Employment Opportunity Comm'n, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm.

1. The first method by which the EEOC attempts to informally resolve employment disputes is through its mediation program. Once it receives a charge, but before it investigates, the EEOC offers the employer and employee the services of an experienced mediator who will give "the parties the opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into solutions." U.S. Equal Employment Opportunity Comm'n, Facts About Mediation, http://eeoc.gov/eeoc/mediation/facts.cfm. If the parties can reach agreement, the case can be resolved without any investigation or litigation. *Id.* If not, the EEOC proceeds with its investigation of the charge. *Id.*

The EEOC's mediation program has been described as "a remarkably efficient mechanism that often produces a practical solution for workplace disputes while avoiding the time, expense, and emotional strain of a trial." Robert E. Talbot, *A Practical Guide*

to Representing Parties in EEOC Mediations, 37 U.S.F. L. Rev. 627, 628 (2003). One study undertaken by the EEOC shows that some 96% of employers and 91% of employees who participated would use the program again if offered.[4] It is also highly effective: in 2012, some 76% of the parties who agreed to mediate were able to successfully resolve their claims, in an average of only 101 days.[5]

2. The second process by which the EEOC attempts to resolve employment disputes is through the facilitation of private settlement agreements. During the charge investigation process, EEOC investigators "have the authority to sign any settlement agreement which is agreeable to both parties," including agreements requiring "withdrawal of the charge." 29 C.F.R. § 1601.20. These settlement agreements can "save [an employer] the time and effort associated with [EEOC] investigations," and allow charges to be terminated with "no admission of liability." U.S. Equal Employment Opportunity Comm'n, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm. Over the past decade, between 6.5% and 11.1% of

---

[4] *See* U.S. Equal Employment Opportunity Comm'n, An Evaluation of the Equal Employment Opportunity Commission Mediation Program (Sept. 2000), http://eeoc.gov/eeoc/mediation/report/index.html.

[5] *See* U.S. Equal Employment Opportunity Comm'n, EEOC Mediation Statistics FY 1999 through FY 2012, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm. These statistics show that the mediation program's success rate has risen steadily since 1999.

ADEA cases at the EEOC were resolved each year via settlement.[6]

3. The third way the EEOC attempts to resolve employment disputes without litigation is through conciliation. Once an investigation is complete, if the EEOC "establishes that there is 'reasonable cause' to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions." *Id.* During the conciliation process, the EEOC investigator works with the employer and employee "to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief" without the need for litigation. 29 C.F.R. § 1601.24(a). In 2012, the EEOC successfully conciliated 45% of the cases in which it found reasonable cause for discrimination.[7]

The EEOC's collective administrative efforts to resolve disputes without litigation have been recognized as highly successful, and with good reason, for they "at once enable[ ] aggrieved individuals to seek redress for harms suffered, allow[ ] employers to resolve workplace disputes earlier and through more informal means, and help[ ] to reduce the federal court dockets." Anne Noel Occhialino & Daniel Vail, *Why The EEOC (Still) Matters*, 22 Hofstra Lab. & Emp. L.J. 671, 692 (2005).

---

[6] *See* U.S. Equal Employment Opportunity Comm'n, Age Discrimination in Employment Act FY 1997 – FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

[7] The EEOC found 770 charges showed reasonable cause for discrimination, and conciliated 343 of them. *See* U.S. Equal Employment Opportunity Comm'n, *supra*, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

B. Without Preemption, Government Employers Face Increased Federal-Court Litigation of Age Discrimination Claims, With Resulting Financial Harm.

If the Seventh Circuit's judgment is affirmed, however, public-sector employees will be able to bypass the EEOC and its effective pre-suit resolution processes entirely. Specifically, they will be allowed to file § 1983 age-discrimination claims in lieu of ADEA claims, bypassing the EEOC entirely. Section 1983 constitutional claims are not generally subject to administrative exhaustion, *see Patsy v. Bd. of Regents of Florida,* 457 U.S. 496, 516 (1982), and the EEOC does not have statutory authority to police constitutional discrimination claims in any event. *See, e.g.*, 29 U.S.C. § 626(b) (providing only that the EEOC shall enforce the "provisions of this chapter"); 42 U.S.C. § 2000e-5(a) (same); *see also* U.S. Equal Employment Comm'n, Laws Enforced by EEOC, http://www.eeoc.gov/laws/statutes/index.cfm (setting forth the limited federal statutes over which the EEOC has authority).

Diverting age-discrimination claims from the EEOC will increase the quantity and decrease the quality of age-discrimination claims in federal courts. These additional suits will be costly in terms of already-scarce judicial resources. And worse, they will surely lead to significantly increased state and municipal litigation costs which these entities, and ultimately the taxpayers, can ill afford.

1. **Without Preemption of § 1983 Age Discrimination Claims, Employers Will Face More Federal Litigation.** Although ostensibly the ADEA is more protective of employee rights than § 1983, there

would be a drastic increase in federal age-discrimination litigation if the Court were to affirm in this case. There are several reasons why plaintiffs would choose to bring § 1983 claims directly in federal court, instead of proceeding through the ADEA's administrative processes.

First, many plaintiffs would file § 1983 age claims in federal court, in lieu of ADEA claims, out of necessity. The ADEA has a relatively short statute of limitations. It requires a party alleging age discrimination to file an administrative charge with the EEOC within 180 or 300 days (depending on the state) of the date on which the allegedly discriminatory act occurred; otherwise, the claim is time-barred. *See* 29 U.S.C. § 626(d)(1); 42 U.S.C. § 2000e-5(e).

By contrast, § 1983 claims "borrow the state statute of limitations for personal injury actions." *Owens v. Okure*, 488 U.S. 235, 236 (1989) (citing *Wilson v. Garcia*, 471 U.S. 261 (1985). In nearly every state, plaintiffs have significantly more time than the ADEA's 300-day maximum to file a § 1983 suit—two or three years in most,[8] with some states giving plaintiffs up to *six years* to file.[9] Indeed, if

---

[8] *See, e.g.*, *Gomez v. Randle*, 680 F.3d 859, 864 (7th Cir 2012) (Illinois, 2 years); *Koch v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009) (Pennsylvania, 2 years); *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988) (Michigan, 3 years); *Shomo v. City of New York*, 579 F.3d 176, 181 (2d Cir 2009) (New York, 3 years); *Price v. City of San Antonio*, 431 F.3d 890, 892 (5th Cir. 2005) (Texas, 2 years).

[9] The limitations period is four years in Florida, Nebraska, Utah, and Wyoming, five years in Missouri, and six years in Maine, Minnesota, North Dakota, and Wisconsin. *See City of Hialeah, Florida v. Rojas*, 311 F.3d 1096, 1103 n. 2 (11th Cir

§ 1983 age-discrimination claims are held to be viable nationwide, then government employers would face not only expanded liability going forward, they would also become liable retroactively for *past* age discrimination that would have been time-barred under the ADEA up to a half-decade ago.

Second, many plaintiffs will have financial incentives to bring § 1983 claims instead of ADEA claims. State employees, for instance, cannot receive any damages under the ADEA; liability under the ADEA flows to the employer and the state as employer is protected from damages suits by the Eleventh Amendment. *Kimel v. Board of Regents*, 528 U.S. 62, 66-67 (2000). By contrast, under § 1983, a plaintiff can sue the specific individuals *working* for a state government, and these individuals do not share in the state's sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985). And while the state technically remains immune to § 1983 damages,

---

(continued...)

2002); *Baker v. Chisom*, 501 F.3d 920, 922 (8th Cir. 2007); *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995); *Gee v. Pacheco*, 627 F.3d 1178, 1190 (10th Cir. 2010); *Sulik v. Taney County, Mo.*, 393 F.3d 765, 766-67 (8th Cir 2005); *Small v. City of Belfast*, 796 F.2d 544, 546 (1st Cir. 1986); *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 618 n. 3 (8th Cir. 1995); *Carpenter v. Williams County, N.D.*, 618 F. Supp. 2d 1293, 1294 (D.N.D. 1985); *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989).

Only California, Kentucky, Louisiana, and Tennessee—all of which have one-year limitations periods for § 1983 actions—have filing deadlines similar to the ADEA's 300-day maximum. *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001); *Collard v. Ky. Bd of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990); *Bourdais v. New Orleans City*, 485 F.3d 294, 298 (5th Cir. 2007), *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 547 (6th Cir. 2000).

in practice most states indemnify their employees, preserving the state as a "deep pocket" that will satisfy most § 1983 judgments.[10]

Likewise, a plaintiff might prefer a § 1983 suit because of the possibility of winning punitive damages. Under the ADEA, punitive damages are generally unavailable.[11] But they are permitted in § 1983 suits against individuals acting under color of state law. *Smith v. Wade*, 461 U.S. 30, 35 (1983).

Third, some plaintiffs might believe that the *in terrorem* effect of a federal lawsuit would be leverage for a quick settlement, and thus they would not want to "waste time" having an administrative agency review their claims. And not without reason. As discussed below, *infra* at Part I.B.2, EEOC proceedings are relatively inexpensive. By contrast, the costs of federal civil discovery are high, and fall almost entirely on the employer in discrimination cases. Indeed, these discovery costs can approach or exceed a plaintiff's potential damages award. *See* Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost Of Electronic Discovery In Employment Litigation*, 14 Rich. J.L. & Tech. 9, ¶ 8 (2008). Such costs may "systemically force [a state or municipal defendant] to either resolve cases that would otherwise be decided on the merits, or resolve them at a higher price because electronic discovery is inevitable." *Id.* For it is well-established that municipalities will often "just make

---

[10] Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability For Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209, 1211 (2001),

[11] *See generally* 1 Barbara T. Lindemann et al., Employment Discrimination Law 12-176 (5th ed. 2012).

a business decision to settle, rather than run the risk of a much greater tort judgment against [them]." Henry Goldman, *Legal Claims Add to New York City's Budget Woes*, Bloomberg Businessweek (Sept. 13, 2012), http://www.businessweek.com/articles/2012-09-13/legal-claims-add-to-new-york-citys-budget-woes (quoting New York City mayor Michael Bloomberg). Plaintiffs, particularly those seeking nuisance settlements of relatively weak claims, will thus have very little incentive to bring ADEA claims through the EEOC, but significant incentive to immediately sue in federal court.

Fourth and finally, plaintiffs may well file § 1983 claims in lieu of ADEA claims because many courts (including the district court below) erroneously treat ADEA and § 1983 claims as fungible. As discussed at length in IMLA's petition-stage briefing, these courts impose the same *McDonnell Douglas* burden-shifting test used for ADEA claims to § 1983 age-discrimination claims, apparently presuming that age-based decisions are "arbitrary and irrational" under the rational-basis test.[12] *See generally infra* at

[12] *See, e.g., Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341, at *12-20 & n.16 (N.D. Ill. July 12, 2011); *Burkhardt v. Lindsay*, 811 F. Supp. 2d 632, 651 (E.D.N.Y. 2011) (citing authority for proposition that "[a]ge-based employment discrimination claims brought pursuant to § 1983 are analyzed under the three-step, burden-shifting framework" of *McDonnell Douglas*); *Shapiro v. New York City Dep't of Educ.*, 561 F. Supp. 2d 413, 422 n.2 (S.D.N.Y. 2008) ("An equal protection claim for age discrimination pursuant to § 1983 is analyzed under the same standards as a claim made pursuant to the ADEA."); *Siler v. Hancock County Bd. of Educ.*, 510 F. Supp. 2d 1362, 1381-82 (M.D. Ga. 2007) ("when a plaintiff asserts a § 1983 claim based on age discrimination, courts apply the same analysis to such a claim as they would an ADEA claim."); *Abel v. Auglaize County Highway Dep't*, 276 F. Supp. 2d 724, 733 (N.D. Ohio 2003)

Part II. If the courts do not impose any substantive disadvantage on § 1983 age-discrimination claimants, then the decision to forego "delay" in the EEOC, and simply head to federal court, becomes costless. Indeed, it becomes economically efficient.

2. Federal Constitutional Age-Discrimination Litigation is More Costly Than Administrative Review, and Comes at the Unique Expense of Public Employers. But whatever an individual's motivation, shifting age-discrimination cases from the EEOC to the federal courts will impose unique, costly burdens on public employers. As a general matter, the costs of federal litigation far outstrip the costs of EEOC administrative review. On average, an "employer defending itself against a discrimination claim" at the EEOC would spend "between $4,000 and $10,000." Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 Pepp. Disp. Resol. L.J. 211, 225 (2009). In federal court, that same employer would likely spend "at least $75,000 to take a case to summary judgment, and at least $125,000, and possibly much more, to defend itself at trial." *Id.*

(continued...)

("Since Plaintiff claims age discrimination in violation of 42 U.S. § 1983, he can make the required showing of discriminatory intent and purpose by following the methods of proof in Age Discrimination in Employment Act cases."); *Stalhut v. City of Lincoln*, 145 F. Supp. 2d 1115, 1121-22 (D. Neb. 2001) (applying *McDonnell Douglas* to both ADEA and § 1983 age claim); *Mummelthie v. City of Mason City*, 873 F. Supp. 1293, 1332-36 (N.D. Iowa 1995) ("a § 1983 claim based on alleged violation of equal protection in the employment context is analyzed in the same way as . . . an ADEA claim of age discrimination").

This is simple common sense. If an age-discrimination case survives a motion to dismiss, then it will not be resolved until after civil discovery has been completed. And this Court has recognized discovery as the most costly aspect of modern civil litigation, amounting to between 60 and 90 percent of all litigation costs. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting). Worse, these costs are decidedly one-sided in employment cases, with employers bearing the brunt. Satterwhite & Quatrara, *supra*, at ¶¶ 6-7 (2008). And the specter of such costs often has immediate impact, well in advance of trial, as municipalities often set aside cash reserves to "cover the expected outlay of funds" that might result from a future claim not yet decided. Sydney Cresswell & Michael Landon-Murray, *Assessing the Fiscal Impact of Lawsuits on New York State Municipalities* 7 (Oct. 2011) *at* http://www.albany.edu/polis/research.shtml.

Moreover, these new, unique costs will come at the direct public expense, because "every dollar that [governments] spend on litigation can be spent on services to the public." Christina Villacorte, *Group Says Los Angeles County, City Under Siege From Lawsuits*, L.A. Daily News (Apr. 13, 2013) (internal quotation marks omitted), *available at* 2013 WLNR 9042802; *accord, e.g.*, Bethany Krajelis, *Group Reports On City Litigation Costs, Urges Constraint*, Chicago Daily Law Bulletin (July 28, 2011), *at* http://www.chicagolawbulletin.com/News-Extra/study1-7282011bk.aspx ("if [Chicago] didn't spend so much fighting and settling lawsuits, it could save taxpayer dollars, help the city to close its budget deficit and avoid personnel cuts"); John P. Avlon, *Sue*

City, Forbes (Jul. 14, 2009), at http://www.forbes.com/2009/07/14/new-york-city-tort-tax-opinions-contributors-john-p-avlon.html (noting that, with one exception, damages paid by New York City agencies come "out of the general city budget fund."); Jeremy Boren, *Lawsuits Add To Pittsburgh's Financial Woes*, Pitt. Tribune Review (April 8, 2006) ("Lawsuits have amplified the costs of guiding Pittsburgh out of its financial mess."), *available at* 2006 WLNR 5946277. If governments have to spend more on litigation, they will have to either cut services or increase taxes or debt to cover the difference. Neither is an attractive choice in these troubled economic times. It is hard to ask property owners to pay more tax, or citizens to make do with less public services, solely to feed the litigation beast, particularly when those expenses could have been avoided with well-established, pre-trial EEOC review procedures.

Finally, and perhaps most troublingly, these new financial burdens would be imposed solely on government employers—arguably the class of employers least well-positioned to bear them. Constitutional age-discrimination suits may only be brought against persons acting under the color of state law, *see* 42 U.S.C. § 1983, and so private employers will face only ADEA, and not § 1983 liability. It would be puzzling for this Court to impose such a double standard, particularly given its recent recognition that the federal government and the states have *already* given workers significant employment protections (here, the ADEA), and that if "every employment decision became a constitutional matter" then this Court "will have undone Congress's (and the States') careful work." *Engquist v. Oregon*,

553 U.S. 591, 607 (2008) (internal quotation marks and citations omitted). Yet that would flow inexorably from an affirmance of the Seventh Circuit's outlier decision here.

* * *

If this Court were to affirm the Seventh Circuit, the real-world results would be swift, sure, and severe. The EEOC will lose the opportunity to mediate, settle, or conciliate age discrimination claims for one of the nation's largest job sectors. Government employers will face increased litigation expenses from increased numbers of federal lawsuits. And taxpayers will, one way or another, suffer as a result. Governments, acting in the capacity of employers and not sovereigns, should not be singled out and forced to bear these increased burdens.

II. IF THIS COURT REJECTS PREEMPTION, IT SHOULD AT LEAST CLARIFY THAT A § 1983 CLAIM IS NOT FUNGIBLE WITH CLAIMS UNDER THE ADEA.

Although some increase in federal litigation over age-discrimination claims will be inevitable if this Court were to affirm the Seventh Circuit's ruling permitting § 1983 claims by aggrieved state and municipal employees, some of the impact would be mitigated were the Court to make clear—contrary to the district court's ruling below—that § 1983 age discrimination claims should not be adjudged under the same evidentiary framework of ADEA cases. Accordingly, even if the Court were inclined to permit § 1983 claimants to end-run the ADEA, at the very least, the Court should correct the lower courts' incorrect handling of what should be difficult-to-prove rational-basis age discrimination claims.

The trial court, along with several others to address the issue, *see supra* n. 12, held that § 1983 age discrimination plaintiffs and ADEA plaintiffs alike may prove their allegations under the burden-shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) used in Title VII cases. But that test is fundamentally inconsistent with this Court's teachings on rational-basis review, which is how § 1983 age-discrimination claims should be evaluated.[13] *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976). If plaintiffs choose, for whatever reason, to forego the ADEA and its generous provisions, then those plaintiffs should have to contend with the stringent limitations on equal-protection claims that, as here, involve non-suspect classifications.

Under the *McDonnell Douglas* test, once a plaintiff has shown that he was treated differently than a similarly-situated employee not in the protected class, it is "presum[ed] that the employer unlawfully discriminated against the employee." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The employer must then rebut this prima facie case with "admissible evidence" that there was a "legitimate, nondiscriminatory reason" for the difference in treatment. *Id.* at 254-55. If the

---

[13] Although the vast majority of precedents on rational-basis review have come in the context of legislation and not executive decision-making, this Court has never "suggest[ed] that the protections of the Equal Protection Clause are any less when the classification is drawn by . . . administrative action." *Nordlinger v. Hahn*, 505 U.S. 1, 16 n.8 (1992); *cf. Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367-68 (2001) (same rational-basis test would apply in Equal Protection case involving discrimination against individual employees).

employer does not set forth such a rationale, the plaintiff prevails as a matter of law. *Id.* at 254.

If, however, the employer does produce such evidence, then the presumption falls away. The plaintiff may yet prevail by offering evidence that the employer's stated pretext is false. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). If the plaintiff proves that the stated reason is false, then that is, itself, sufficient to allow a jury to infer that the actual reason for the employment decision was unlawful discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

Whatever its usefulness in the context of the ADEA,[14] where heighted scrutiny applies to age-based classifications, *see Kimel*, 528 U.S. at 88, it is not appropriate for constitutional age discrimination claims reviewed for only a rational basis. Under rational-basis review, governmental action "must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that could provide a rational basis" for that action. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added); *accord Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2080 (2012) (rational-basis standard met if decision "rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.") (internal citation marks and quotations omitted).

---

[14] Although widely adopted by the Courts of Appeals, this Court "has not definitively decided whether the evidentiary framework *of McDonnell Douglas* . . . is appropriate in the ADEA context." *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2349 n.2 (2009).

The Government need not state the *actual* reason for its decision, and in fact it "has no obligation to produce evidence to sustain the rationality of" its decision. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Rather, the rational-basis test is satisfied so long as any plausible hypothetical reason for an action exists, "whether or not the basis has a foundation in the record." *Id.* at 320-21; *Beach Commc'ns*, 508 U.S. at 315 (governmental action reviewed for rational basis "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."). And because hypothetical reasons for the Government's actions suffice, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the" action. *Garrett*, 531 U.S. at 367.

The *McDonnell Douglas* test cannot be squared with any of these fundamental pillars of rational basis review. It requires the Government to state the specific, actual factual basis for its decision, or else suffer a default judgment. It subjects that specific factual assertion to courtroom analysis, without recognizing that the Government's decision can be justified by "rational speculation" and hypothetical justifications outside of the record. And it eliminates the plaintiff's burden to disprove *every* conceivable state of facts that might have supported the Government's action, by instead premising potential liability on the truth or falsity of the Government's specific, stated reason.

Indeed, this case actually highlights how badly suited *McDonnell Douglas* burden-shifting is to a rational-basis adjudication. The district court here

specifically found that there were "facially legitimate" reasons for the Government's decision to terminate Levin, including his supervisor's perceptions of Levin's substandard "work ethic, productivity, performance, judgment, and human relations." *Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341, at *18 (internal quotation marks omitted). Under rational-basis review, that should be the end of the inquiry, and the end of the plaintiff's case, because there were reasonably conceivable reasons to fire Levin. *See, e.g., Beach Commc'ns*, 508 U.S. at 313. But, applying *McDonnell Douglas*, the district court denied summary judgment because Levin had evidence, among other things, that "the reasons were manufactured post-hoc" and that *one* (but not all) of the stated reasons did not have a "solid factual foundation" *Levin*, 2011 WL 2708341, at *18-20. Such analysis is self-evidently incompatible with rational-basis review, where post-hoc justifications are entirely permissible, and where the plaintiff has the burden to show that *all* possible reasons for an action are implausible, and not just a single one.

Under a proper rational basis review, Levin's claims should have been dismissed. Yet the Illinois Attorney General's office is still being forced to expend resources to litigate an ADEA-style claim—resources that, plainly, Illinois could better spend elsewhere. *See, e..g., Illinois In Poorest Fiscal Condition of All States*, Chi. Tribune (June 21, 2012), *at* http://articles.chicagotribune.com/2012-06-21/business/chi-illinois-in-poorest-fiscal-condition-of-all-states-20120621_1_unfunded-pension-liability-general-fund-state-funds ("Illinois' financial condition continued to deteriorate in fiscal 2011, leaving it with the lowest level of net assets in the country, as its

liabilities, including money owed for public pensions, grew.").

* * *

The rational-basis test is, by design, difficult for a plaintiff to overcome. Indeed, this Court has "never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner." *Engquist.*, 553 U.S. at 605-06. So if this Court holds that § 1983 age-discrimination claims are not preempted by the ADEA (and it should hold them preempted), it should also hold that plaintiffs take the bitter with the sweet. These § 1983 age discrimination claims should be reviewed under the deferential standards of rational-basis review, and not the heightened scrutiny of *McDonnell Douglas* burden-shifting available under the ADEA.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

THOMAS J. DAVIS
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

June 10, 2013

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
'ND
BRIEFS

No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, et al.,

Petitioners,

—v.—

HARVEY N. LEVIN,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CHARLES S. SIMS
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3000
csims@proskauer.com

STEPHEN I. VLADECK
Counsel of Record
4801 Massachusetts Avenue, N.W.
Washington, DC 20016
(202) 274-4241
svladeck@wcl.american.edu

Attorneys for Amici Curiae *Law Professors*

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE COURT OF APPEALS LACKED JURISDICTION TO DECIDE THE QUESTION ON WHICH CERTIORARI WAS GRANTED 5

II. ALTHOUGH THERE IS NO BAR TO THIS COURT REACHING THE QUESTION PRESENTED, IT SHOULD DECLINE TO DO SO 26

CONCLUSION 34

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Abney v. *United States*,
431 U.S. 651 (1977) 10

Al Shimari v. *CACI Int'l, Inc.*,
679 F.3d 205 (4th Cir. 2012) (en banc) 30

Altman v. *City of High Point*,
330 F.3d 194 (4th Cir. 2003) 14

Ashcroft v. *Iqbal*,
556 U.S. 662 (2009) .....passim

Behrens v. *Pelletier*,
516 U.S. 299 (1996) 23

Clinton v. *Jones*,
520 U.S. 681 (1997) 18, 32

Cobbledick v. *United States*,
309 U.S. 323 (1940) 5, 6

Cohen v. *Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) .....passim

Di Bella v. *United States*, 369 U.S. 121 (1962)..... 32

Digital Equip. Corp. v. *Desktop Direct, Inc.*,
511 U.S. 863 (1994) 2, 6, 7

Firestone Tire & Rubber Co. v. *Risjord*,
449 U.S. 368 (1981) 6, 32

Hartman v. *Moore*,
547 U.S. 250 (2005) ..... passim

Hertz Corp. v. *Friend*,
559 U.S. 77 (2010) 17

Hohn v. *United States*,
524 U.S. 236 (1998) 17

Iqbal v. *Hasty*,
490 F.3d 143 (2d Cir. 2007) 23, 25

Johnson v. *Jones*,
515 U.S. 304 (1995) ..... passim

Kerr v. *U.S. Dist. Ct. for the N. Dist. of Cal.*,
426 U.S. 394 (1976) 5

Kincade v. *City of Blue Springs*,
64 F.3d 389 (8th Cir. 1995) 14

King v. *Cessna Aircraft Co.*,
562 F.3d 1374 (11th Cir. 2009) 14

Kircher v. *Putnam Funds Trust*,
547 U.S. 633 (2006) 32

Kirtsaeng v. *John Wiley & Sons, Inc.*,
133 S. Ct. 1351 (2013) 26

Levin v. *Madigan*,
692 F.3d 607 (7th Cir. 2012),
cert. granted, 133 S. Ct. 1600 (2013)..... 3, 11, 12, 16

Levin v. *Madigan*, 697 F. Supp. 2d 958
(N.D. Ill. 2010) 11

Levin v. *Madigan*,
No. 07-C-4765, 2011 WL 2708341
(N.D. Ill. July 12, 2011) 11, 22

Liberty Mut. Ins. Co. v. *Wetzel*,
424 U.S. 737 (1976) 31

Lyons v. *City of Xenia*,
417 F.3d 565 (6th Cir. 2005) 20

Malik v. *Arapahoe County Dep't of Soc. Servs.*,
191 F.3d 1306 (10th Cir. 1999) 11

Mattox v. *City of Forest Park*,
183 F.3d 515 (6th Cir. 1999) 13

Midland Asphalt Corp. v. *United States*,
489 U.S. 794 (1989) 29

Mitchell v. *Forsyth*,
472 U.S. 511 (1985) 8, 9, 22

Mohawk Indus. v. *Carpenter*,
558 U.S. 100 (2009) 6, 7

Moore v. *City of Wynnewood*,
57 F.3d 924 (10th Cir. 1995) 13

Moore v. *Hartman*,
388 F.3d 871 (D.C. Cir. 2004)..... 19

Mueller v. *Auker*,
576 F.3d 979 (9th Cir. 2009) 13

Nixon v. *Fitzgerald*,
457 U.S. 731 (1982) 18, 32

Pearson v. *Callahan*,
555 U.S. 223 (2009) 20

Richardson-Merrell, Inc. v. *Koller*,
472 U.S. 424 (1985) 6

Robbins v. *Wilkie*,
300 F.3d 1208 (10th Cir. 2002) 20, 21

Saucier v. *Katz*,
533 U.S. 194 (2001) 20

Stratton v. *St. Louis S.W. Ry. Co.*,
282 U.S. 10 (1930) 32

Swint v. *Chambers County Commission*,
514 U.S. 35 (1995) .....passim

Toussie v. *Powell*,
323 F.3d 178 (2d Cir. 2003)..... 15, 25, 33

U.S. Bancorp Mortg. Co. v. *Bonner Mall P'Ship*,
513 U.S. 18 (1994) 26

Van Cauwenberghe v. *Biard*,
486 U.S. 517 (1988) 29

Vance v. *Terrazas*,
444 U.S. 252 (1980) 18

Wilkie v. *Robbins*,
551 U.S. 537 (2007) .....passim

Will v. *Hallock*,
546 U.S. 345 (2006) 2, 7, 29

Will v. *United States*,
389 U.S. 90 (1967) 5

Wong v. *U.S. INS*,
373 F.3d 952 (9th Cir. 2004) 20

Yamaha Motor Corp., U.S.A. v. *Calhoun*,
516 U.S. 199 (1996) 18

CONSTITUTIONAL PROVISIONS

Equal Protection Clause,
U.S. CONST. amend. XIV, § 1 ..... 1, 4, 14, 15

STATUTES AND COURT RULES

28 U.S.C. § 1253 17

28 U.S.C. § 1254 ..... 16, 17, 18, 19

28 U.S.C. § 1257 17

28 U.S.C. § 1259(4) 17

28 U.S.C. § 1291 ..... passim

28 U.S.C. § 1292(b) 18

Age Discrimination in Employment Act (ADEA),
29 U.S.C. §§ 621 *et seq.* ..... passim

42 U.S.C. § 1983 ..... passim

SUP. CT. R. 19.2 18

OTHER AUTHORITIES

Riyaz A. Kanji,
Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*,
100 YALE L.J. 511 (1990) 10, 14

Joan Steinman,
The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint,
49 HASTINGS L.J. 1337 (1998) 10

Stephen I. Vladeck,
Pendent Appellate Bootstrapping,
16 GREEN BAG 2D 199 (2013) 28, 30

16 CHARLES ALAN WRIGHT ET AL.,
FEDERAL PRACTICE AND PROCEDURE (1996) 11

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors whose teaching, research, and writing focus on federal jurisdiction and the relationship between the trial and appellate courts within the federal system. *Amici* are impelled to file this brief to flag a jurisdictional issue not raised by Petitioners, Respondent, or any other *amici*: Specifically, the Seventh Circuit lacked "pendent appellate jurisdiction" on an interlocutory qualified immunity appeal to decide the question on which certiorari was granted, *i.e.*, whether the remedial scheme created by Congress in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, displaces age-discrimination suits by state employees under the Equal Protection Clause and 42 U.S.C. § 1983.

Moreover, although *this* Court does not suffer from a similar jurisdictional defect, sustaining the Court of Appeals' pendent appellate jurisdiction in this case would precipitate the very result that a unanimous Court warned against in *Swint* v.

---

1. The parties have filed blanket consents to the filing of *amicus* briefs in this case. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Chambers County Commission, 514 U.S. 35, 49–50 (1995) ("[A] rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets.").

SUMMARY OF ARGUMENT

This Court repeatedly has stressed the importance of carefully circumscribing the "collateral order doctrine"—which is "best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Thus, although the doctrine treats as "final" for purposes of appeal certain trial-court orders that are interlocutory, this Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will* v. *Hallock*, 546 U.S. 345, 350 (2006) (citations and internal quotation marks omitted).

The "modest scope" of the collateral order doctrine is reflected not only in the narrow category of orders subject to it, but also in the *scope* of the interlocutory appellate jurisdiction that it confers even in cases in which it applies. *See, e.g.*, *Johnson* v. *Jones*, 515 U.S. 304 (1995). To that end, this Court has expressed significant skepticism about the concept of "pendent appellate jurisdiction," and has

constrained the extent to which courts entertaining interlocutory appeals may use such jurisdiction to reach and resolve issues that are not themselves immediately appealable. In *Swint*, for example, this Court suggested that such "pendent appellate jurisdiction" would be appropriate, if at all, only in cases in which the district court ruling over which pendent review is sought "was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or [in which] review of the former decision was necessary to ensure meaningful review of the latter." 514 U.S. at 51.

In this case, the Seventh Circuit decided the question on which certiorari has been granted by purporting to exercise pendent appellate jurisdiction as part of on an interlocutory appeal from the district court's denial of Petitioners' motion for summary judgment on the basis of qualified immunity. *See Levin* v. *Madigan*, 692 F.3d 607 (7th Cir. 2012), *cert. granted*, 133 S. Ct. 1600 (2013). Although the Court of Appeals stressed that resolution of the cause-of-action question was "irrelevant" to Petitioners' entitlement to qualified immunity, *see id.* at 622, it nevertheless concluded that it had "pendent appellate jurisdiction" over the cause-of-action question under this Court's decision in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007). *See* 692 F.3d at 611.

In so holding, the Seventh Circuit both misapplied *Swint* and erred by equating the scope of

its interlocutory appellate jurisdiction with the scope of this Court's jurisdiction in such cases. As a logical matter, whether it was clearly established at the time of Respondent's termination that the Equal Protection Clause prohibits irrational age discrimination in no way turns on whether the ADEA displaces remedies under 42 U.S.C. § 1983—and vice-versa.

Nor do any of this Court's prior holdings support the Court of Appeals' jurisdictional analysis. Despite inartful dicta to the contrary in *Hartman* v. *Moore*, 547 U.S. 250 (2005), *Wilkie*, and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), *Hartman* and *Iqbal* both presented far more compelling cases for pendent appellate jurisdiction. And in any event, there are critical differences between the scope of a circuit court's appellate jurisdiction under the collateral order doctrine and this Court's jurisdiction over all cases "in" the courts of appeals; the latter is considerably broader.

To be sure, as this Court's prior decisions attest, because the Seventh Circuit had jurisdiction over the qualified immunity issue, the Supreme Court still has the *power* to proceed to the merits notwithstanding the pendent jurisdictional defect below. But compelling reasons of prudence, practice, and policy all favor vacating the decision below and returning this case to the district court, rather than rewarding the Court of Appeals' jurisdictional bootstrapping.

ARGUMENT

I. THE COURT OF APPEALS LACKED JURISDICTION TO DECIDE THE QUESTION ON WHICH CERTIORARI WAS GRANTED

a. The Collateral Order Doctrine Represents a Narrow and Carefully Circumscribed Departure from the Final Judgment Rule

As Justice Frankfurter explained over 70 years ago, "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U.S. 323, 324–25 (1940) (footnotes omitted). Thus, "it has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (quoting *Will* v. *United States*, 389 U.S. 90, 96 (1967)).

The resulting "final judgment" rule codified today at 28 U.S.C. § 1291 serves as an important statutory barrier to what might otherwise be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt civil litigation toward the party

with greater financial resources. *See Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981) ("In addition, the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.'" (quoting *Cobbledick*, 309 U.S. at 325) (alteration in original; citation omitted)); *see also Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985) ("In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" (citation omitted)).

Although there are a host of statutory exceptions to this general rule, the most significant source of authority for interlocutory appeals is the "collateral order" doctrine, which "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip.*, 511 U.S. at 867 (quoting *Cohen*, 337 U.S. at 546). To that end, collateral order appeals encompass "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 106 (2009); *see also Swint*, 514 U.S. at 42 ("That small category

includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.").

Because of its controversial origins, amorphous grounding, and ambiguous scope, and to ensure that the "underlying doctrine [does not] overpower the substantial finality interests § 1291 is meant to further," *Hallock*, 546 U.S. at 350, this Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Id.*; *see also id.* ("And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."). As Justice Souter explained in *Digital Equipment*, "the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered . . . ." 511 U.S. at 868 (citation omitted).

Moreover, "This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus.*, 558 U.S. at 113 (quoting *Swint*, 514 U.S. at 48); *see*

also id. at 115 (Thomas, J., concurring in part and concurring in the judgment) ("We need not . . . further justify our holding by applying the *Cohen* doctrine, which prompted the rulemaking amendments in the first place.").

b. Collateral Order Appeals Should Be Limited to the Properly Appealed Question and Those Issues the Resolution of Which is Necessary to Decide that Question

The "modest scope" of the collateral order doctrine is reflected not only in the narrow category of orders subject to it—which this Court has carefully circumscribed—but also in the *scope* of the interlocutory appellate jurisdiction that it confers even in cases in which it applies. Thus, although *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), held that a district court's denial of summary judgment on an officer-defendant's claim of qualified immunity was an immediately appealable collateral order, the Court later clarified that such interlocutory qualified immunity appeals are necessarily limited in their breadth.

As Justice Breyer explained in *Johnson* v. *Jones*, interlocutory review of a qualified immunity appeal should not encompass whether there was a genuine issue of material fact. In his words, the theory behind the collateral order doctrine

> finds a "final" district court decision in part because the immediately appealable decision involves issues significantly different from those that underlie the plaintiff's basic case. . . . *Mitchell* rested upon the view that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." It held that this was so because, although sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits (*i.e.*, in the absence of qualified immunity).

515 U.S. at 314 (quoting *Mitchell*, 472 U.S. at 527); *see also id.* ("[*Mitchell*] explicitly limited its holding to appeals challenging . . . what law was 'clearly established.'"); *Mitchell*, 472 U.S. at 528 ("An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, *nor even determine whether the plaintiff's allegations actually state a claim*." (emphasis added)).

To similar effect, this Court has expressed significant skepticism about the concept of "pendent appellate jurisdiction," and has constrained the extent to which courts entertaining interlocutory appeals may use such jurisdiction to reach and

resolve issues that are not themselves immediately appealable. *See, e.g.*, Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After* Swint, 49 HASTINGS L.J. 1337 (1998); Riyaz A. Kanji, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511 (1990). Writing for a unanimous Court in *Swint*, for example, Justice Ginsburg suggested that such "pendent appellate jurisdiction" would be appropriate, if at all, only in cases in which the district court ruling over which pendent review is sought "was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or [in which] review of the former decision was necessary to ensure meaningful review of the latter." 514 U.S. at 51.

Otherwise, *Swint* warned, "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 49–50; *see also Johnson*, 515 U.S. at 318 (assuming only for the sake of argument that pendent appellate jurisdiction is ever permissible in a collateral order appeal); *Abney* v. *United States*, 431 U.S. 651, 663 (1977) ("Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals

prior to conviction and sentence."). *See generally Malik* v. *Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306, 1316–17 (10th Cir. 1999) ("[E]ven if the purpose of our exercise of pendent jurisdiction is to conserve judicial resources and promote judicial efficiency, the aggregate effect of the seemingly efficient disposition of the individual case is to 'invite frequent extensive briefing and argument of issues that should not be reviewed because review would substantially increase the danger of untoward interference with the trial court process.'" (quoting 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3937, at 696 (1996))).

c. In This Case, the Court of Appeals Held that the Question Presented Was "Irrelevant" to Petitioners' Qualified Immunity Appeal

In this case, the Court of Appeals reached the question on which certiorari was granted only by purporting to exercise pendent appellate jurisdiction. *See Levin*, 692 F.3d at 610–11. In denying the defendants' motion for summary judgment on qualified immunity grounds, the district court also left intact an earlier decision holding that "the ADEA does not preclude a § 1983 suit for age discrimination." *Levin* v. *Madigan*, No. 07-C-4765, 2011 WL 2708341, at *12 (N.D. Ill. July 12, 2011); *see also Levin* v. *Madigan*, 697 F. Supp. 2d 958 (N.D. Ill. 2010). As Judge Chang explained, "The qualified-immunity analysis, with its focus on whether it was

reasonably clear that the official's conduct violated a constitutional right, is a poor fit for determining whether one cause of action or another is the appropriate one upon which to base a lawsuit against that otherwise clearly prohibited conduct." *Levin*, 2011 WL 2708341, at *12; *see also id.* ("It is especially odd to apply qualified immunity in the context where the procedural uncertainty arises from the fact that Congress created a statutory remedy for age discrimination that is substantively *broader* than the equal protection clause.").

On interlocutory appeal, the Seventh Circuit affirmed the district court's recognition of a viable § 1983 claim, and then affirmed its denial of the defendants' qualified immunity-based motion for summary judgment. This order of battle notwithstanding, Judge Kanne agreed with the district court that "Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is *irrelevant*" for purposes of qualified immunity. *Levin*, 692 F.3d at 622 (emphasis added).

Given that analysis, it is impossible to understand how the Court of Appeals could have concluded that pendent appellate jurisdiction was proper under either of the theories Justice Ginsburg described in *Swint*—*i.e.*, because the existence of a cause of action under § 1983 was "inextricably intertwined" with the defendants' qualified immunity or because review of the cause of action question was

necessary to meaningfully review the defendants' qualified immunity. If the scope of pendent appellate jurisdiction is no broader than that which this Court described in *Swint*, ' ıen the Court of Appeals' own analysis of the lack of relationship between the existence of a § 1983 cause of action and the Petitioners' entitlement to qualified immunity suggests that it lacked jurisdiction to reach the question on which certiorari has been granted.

d. The Court of Appeals Was Correct That the Existence of a Cause of Action is Irrelevant to the Resolution of Qualified Immunity

Of course, the mere fact that the Seventh Circuit *asserted* that the existence of a cause of action is "irrelevant" to Petitioners' entitlement to qualified immunity does not make it so. But *Swint* bears out the Seventh Circuit's conclusion.

In a decision that has been widely followed, the Tenth Circuit understood *Swint* to authorize pendent appellate jurisdiction "only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Moore* v. *City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995); *see Mueller* v. *Auker*, 576 F.3d 979, 990 (9th Cir. 2009) (following *Moore*); *Mattox* v. *City of Forest Park*, 183 F.3d 515, 524 (6th Cir. 1999)

(same); *Kincade* v. *City of Blue Springs*, 64 F.3d 389, 394 (8th Cir. 1995) (same); *see also, e.g.*, *King* v. *Cessna Aircraft Co.*, 562 F.3d 1374, 1379 n.1 (11th Cir. 2009) (citing *Moore* with approval); *Altman* v. *City of High Point*, 330 F.3d 194, 207 n.10 (4th Cir. 2003) (same). Under *Moore*, then, a claim is "inextricably intertwined" with qualified immunity when the disposition of the qualified immunity appeal necessarily resolves—or cannot occur without resolution of—the pendent claim. *See* Kanji, *supra*, at 530 ("The purpose of the collateral order doctrine in ensuring that parties receive a timely review of their important claims does not warrant the forging of additional inroads into the final judgment rule any broader than this.").

Applying that understanding here, it follows that the Seventh Circuit lacked interlocutory appellate jurisdiction to decide whether the ADEA displaces remedies under § 1983 and the Equal Protection Clause. As a logical matter, whether it was clearly established at the time of Respondent's termination that the Equal Protection Clause prohibits irrational age discrimination in no way turns on whether a claim for a violation of the Equal Protection Clause can be pursued against Petitioners under 42 U.S.C. § 1983. Indeed, the remedial relationship between the Age Discrimination in Employment Act (AEDA) and § 1983 has nothing at all to say about the substantive scope of the Equal Protection Clause—either in general or at the time of

the Petitioners' allegedly unlawful conduct. The Seventh Circuit's holding that the scope of the Equal Protection Clause *was* clearly established at the time of Respondent's termination neither turns upon nor resolves the pendent claim, *i.e.*, whether the ADEA bars *enforcement* of the Equal Protection Clause via 42 U.S.C. § 1983. Petitioners are free to contest that point an appeal after final judgment.[2]

---

2. The Second Circuit has taken a somewhat more flexible approach to pendent appellate jurisdiction, holding that courts of appeals may review a claim pendent to a qualified immunity appeal in cases in which there is "substantial factual overlap" between the two issues. *See Toussie* v. *Powell*, 323 F.3d 178, 184 (2d Cir. 2003) ("Whether issues are inextricably intertwined is determined by whether there is substantial factual overlap bearing on the issues raised." (internal quotation marks omitted)).

Amici are concerned that the "substantial factual overlap" standard sweeps too broadly. To take just one example, insofar as the "substantial factual overlap" approach would allow appellate courts to resolve factual sufficiency claims on an interlocutory appeal from a denial of summary judgment based upon absolute or qualified immunity, it seems inconsistent with both *Swint* and *Johnson* v. *Jones*. But even the Second Circuit's approach would not support the Seventh Circuit's exercise of pendent appellate jurisdiction in this case: There is no factual overlap whatsoever between the qualified immunity question in this case (whether it was clearly established at the time of Petitioners' allegedly unlawful conduct that irrational age discrimination violates the Equal Protection Clause) and the question on which certiorari was granted (whether Congress, when it created the ADEA's remedial scheme, intended to displace remedies under 42 U.S.C. § 1983).

e. The Court of Appeals Nevertheless Erred by Conflating This Court's Jurisdiction Under § 1254 With Its Jurisdiction Under § 1291

Notwithstanding the above analysis, the Seventh Circuit justified its exercise of pendent appellate jurisdiction in this case by reference to this Court's decision in *Wilkie*, 551 U.S. 537, which also resolved the existence *vel non* of a cause of action as part of a qualified immunity-based interlocutory appeal. *See Levin*, 692 F.3d at 611; *see also* Pet'r Br. at 1–2 (citing *Wilkie* as holding that, "whether to recognize [a] cause of action is [a] proper question for [an] interlocutory appeal from [the] denial of qualified immunity").

In so holding, the Seventh Circuit erred by equating the scope of *its* interlocutory appellate jurisdiction with the scope of this Court's jurisdiction. In fact, and despite loose language to the contrary in some of this Court's earlier decisions, there are critical differences between the scope of a circuit court's appellate jurisdiction under the collateral order doctrine and this Court's considerably broader jurisdiction over all cases "in" the courts of appeals.

For a host of reasons, Congress has never applied the same final judgment rule to this Court's appellate jurisdiction vis-à-vis the U.S. Courts of Appeals as that which generally constrains the

appellate jurisdiction of the circuit courts. Instead, and in terms far broader than this Court's other fonts of appellate jurisdiction,[3] 28 U.S.C. § 1254 confers authority upon the Supreme Court to review by certiorari *all* "[c]ases in the courts of appeals," "before *or* after rendition of judgment or decree." 28 U.S.C. § 1254(1) (emphasis added). As this Court's practice of allowing certiorari before judgment in exceptional cases underscores, the plain language of § 1254 empowers this Court to exercise jurisdiction over any case from the moment it is properly "in" the court of appeals, without regard to when, how, or why it got there. *See, e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 246–53 (1998); *cf. Hertz Corp.* v. *Friend*, 559 U.S. 77, 83–84 (2010) (noting that the historical lineage of § 1254 "provides particularly strong reasons not to read [another statute's] silence or ambiguous language as modifying or limiting [this Court's] pre-existing jurisdiction").

Moreover, because § 1254 provides jurisdiction over the "case," this Court's statutory jurisdiction in an appeal under § 1254 reaches the entire dispute, and not just those issues that were properly within

---

3. For example, 28 U.S.C. § 1253 authorizes review of "an *order* granting or denying, after notice and hearing, an interlocutory or permanent injunction" by a three-judge district court; and 28 U.S.C. § 1257 authorizes review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" so long as that decision lacks an adequate and independent ground in state law. *See also* 28 U.S.C. § 1259(4) (authorizing review in cases in which the Court of Appeals for the Armed Forces "granted relief").

the scope of the *lower court*'s jurisdiction.[4] *See, e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 689–92 (1997); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 & n.23 (1982); *cf. Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 204–05 (1996) (explaining that interlocutory appellate review under § 1292(b) extends to the entire order certified by the court of appeals, and is not limited to the specific question formulated by the district court). In other words, even when the case that is in the Court of Appeals presents that tribunal with a narrow interlocutory appeal under the collateral order doctrine, *this* Court's appellate jurisdiction over the appealed case is plenary, rather than limited to the issues that the intermediate appellate court could properly decide.[5]

---

4. To that end, when the Supreme Court accepts a certified question from a court of appeals under 28 U.S.C. § 1254(2), the Court's own rules provide that "this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy." SUP. CT. R. 19.2.

5. Of course, this Court does not always—or even usually—*choose* to review issues that either were not or could not have been presented to the lower courts, and for good reason. The critical point for present purposes, however, is that such reluctance on this Court's part is not a matter of jurisdictional compulsion, but is instead based upon sound judicial discretion. *See, e.g.*, *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980) ("[C]onsideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals *is not beyond our power*, and in appropriate circumstances we have addressed them." (emphasis added)).

f. No Holding of this Court Supports the Court of Appeals' Jurisdictional Analysis

A proper understanding of the scope of pendent appellate jurisdiction under *Swint*, together with the distinction between the Court of Appeals' jurisdiction under § 1291 and this Court's authority under § 1254, helps to explain why this Court was able to reach the issues it resolved in *Hartman* v. *Moore*, 547 U.S. 250 (2006), *Wilkie* v. *Robbins*, 551 U.S. 537, and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—even if each of these opinions included inartful language in this regard.

In *Hartman*, this Court held that an absence of probable cause to support a prosecution was a necessary element of a First Amendment claim under *Bivens* for retaliatory prosecution. *See* 547 U.S. at 256–65. As the D.C. Circuit had explained in the decision below, the defendants in *Hartman* argued "that what they were doing could violate a clearly established right *only if* the First Amendment prohibits retaliatory prosecution even when probable cause exists." *Moore* v. *Hartman*, 388 F.3d 871, 877 (D.C. Cir. 2004) (emphasis added), *rev'd on other grounds*, 547 U.S. 250.

Thus framed, whether a plaintiff had to allege an absence of probable cause was inextricably intertwined with the defendants' entitlement to qualified immunity because the pendent issue

directly implicated the scope of the First Amendment right that the defendants allegedly violated—and, therefore, whether that scope was clearly established at the time of the defendants' allegedly unlawful conduct. *See* 547 U.S. at 257 n.5 ("[O]ur holding does not go beyond a definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal."). If pendent appellate jurisdiction is *ever* appropriate on an interlocutory qualified immunity appeal, *Hartman* would appear to be a paradigmatic case for it.[6]

In *Wilkie*, on which the Court of Appeals relied in this case, the district court had initially dismissed the plaintiff's *Bivens* claims for failure to state a claim on which relief could be granted, only to be reversed by the Tenth Circuit on (a then-final) appeal. *See Robbins* v. *Wilkie*, 300 F.3d 1208 (10th Cir. 2002). On remand, the district court denied the defendants' motion for summary judgment,

---

6. It also bears emphasizing that *Hartman* was decided while *Saucier* v. *Katz*, 533 U.S. 194 (2001), and its corresponding "order-of-battle" for qualified immunity cases, was still good law. *But see Pearson* v. *Callahan*, 555 U.S. 223 (2009) (overruling *Saucier*).

Under *Saucier*, a court of appeals on an interlocutory qualified immunity appeal *had* to reach the scope of the constitutional right at issue even in cases in which that scope was *not* clearly established at the time of the relevant conduct. *See, e.g., Lyons* v. *City of Xenia*, 417 F.3d 565, 582–85 (6th Cir. 2005) (Sutton, J., concurring); *Wong* v. *U.S. INS*, 373 F.3d 952, 957 (9th Cir. 2004). Thus, there was no way for the D.C. Circuit in *Hartman* to avoid the probable-cause question.

prompting an interlocutory appeal. The Court of Appeals affirmed the denial of qualified immunity, and this Court granted certiorari, ultimately holding that no *Bivens* cause of action should be inferred for Robbins' claims. *See* 551 U.S. at 549–62. In explaining why the Supreme Court had jurisdiction to reach this issue, Justice Souter's reasoning was cryptic:

> We recognized just last Term that the definition of an element of the asserted cause of action was "directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." Because the same reasoning applies to the recognition of the entire cause of action, the Court of Appeals had jurisdiction over this issue, as do we.

Id. at 550 n.4 (quoting *Hartman*, 547 U.S. at 257 n.5).

This cursory analysis suffers from two distinct shortcomings: *First*, there was no need for the *Wilkie* Court to *defend* the Court of Appeals' jurisdiction. In *Wilkie*, the Court of Appeals had reached the existence of a cause of action on appeal from an indisputably final judgment—the district court's initial dismissal of the plaintiff's claims, which the Tenth Circuit reversed. *See Wilkie*, 300 F.3d 1208. The case came to the Supreme Court only after the

Tenth Circuit had rejected defendants' qualified immunity on post-remand interlocutory appeal, and so there was no question that the Court of Appeals had jurisdiction over the relevant issues at the relevant times. In any event, as explained above, the Supreme Court had jurisdiction to reach the cause of action question without regard to whether the Court of Appeals did, as well.

Second, and more fundamentally, it is simply not accurate to say (as Justice Souter did) that "the same reasoning applies to the recognition of the entire cause of action" as had applied in *Hartman*. The pendent issue in *Hartman* raised the scope of the First Amendment right allegedly violated. In *Wilkie*, in contrast, this Court's discussion of the existence of a *Bivens* cause of action was wholly independent of whether the defendants were entitled to qualified immunity. As in this case, "The qualified-immunity analysis, with its focus on whether it was reasonably clear that the official's conduct violated a constitutional right, is a poor fit for determining whether one cause of action or another is the appropriate one upon which to base a lawsuit against that otherwise clearly prohibited conduct." *Levin*, 2011 WL 2708341, at *12.[7]

---

7. At a more fundamental level, the flaw with *Wilkie*'s analysis is that it is impossible to separate the existence of a cause of action from the merits. *See Mitchell*, 472 U.S. at 528 (upholding application of the collateral order doctrine to qualified immunity appeals because "[a]n appellate court reviewing the denial of the defendant's claim of immunity need

Finally, in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), the district court denied in part the defendants' motion to dismiss on qualified immunity. On appeal, the Second Circuit affirmed in part and reversed in part, holding that it had jurisdiction to reach both the defendants' entitlement to qualified immunity and their amenability to the personal jurisdiction of the district court. As part of the Second Circuit's analysis of qualified immunity, the Court of Appeals also considered the relevant pleading standard that plaintiffs had to meet in order to overcome a qualified immunity defense, holding—albeit sub silentio—that the pleading standard was part-and-parcel of the resolution of the defendants' interlocutory qualified immunity appeal. *See Iqbal* v. *Hasty*, 490 F.3d 143, 153–59 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 662.

The Supreme Court agreed. *See Iqbal*, 556 U.S. at 672 ("[T]he Court of Appeals had jurisdiction to hear petitioners' appeal."). As Justice Kennedy explained,

---

not consider the correctness of the plaintiff's version of the facts, *nor even determine whether the plaintiff's allegations actually state a claim*" (emphasis added)); *see also Behrens* v. *Pelletier*, 516 U.S. 299, 309 n.3 (1996) ("[T]he *Cohen* 'separability' component asks whether the question to be resolved on appeal is 'conceptually distinct from the merits of the plaintiff's claim.'" (citation omitted)). Thus, it is unlikely that the existence of a cause of action will *ever* be an issue over which a court of appeals may permissibly exercise pendent jurisdiction as part of an interlocutory qualified immunity appeal.

> [*Hartman* and *Wilkie*] cannot be squared with respondent's argument that the collateral-order doctrine restricts appellate jurisdiction to the "ultimate issu[e]" whether the legal wrong asserted was a violation of clearly established law while excluding the question whether the facts pleaded establish such a violation. Indeed, the latter question is even more clearly within the category of appealable decisions than the questions presented in *Hartman* and *Wilkie*, since whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded. In that sense the sufficiency of respondent's pleadings is both "inextricably intertwined with," and "directly implicated by," the qualified immunity defense.

Id. at 673 (second alteration in original; citation omitted). This Court thereby concluded that the pleading issue *was* inextricably intertwined with qualified immunity, and so the Court of Appeals properly had jurisdiction to decide the issue.

Although its analysis was necessarily dicta (insofar as this Court's jurisdiction did not turn on that of the Court of Appeals), one way to read *Iqbal* is as implicitly endorsing the Second Circuit's

"substantial factual overlap" standard for pendent appellate jurisdiction. *See ante* at 15 n.2. After all, the Second Circuit itself had used that very rationale to explain why *it* had jurisdiction to reach the pendent issues raised on the defendants' interlocutory qualified immunity appeal. *See Iqbal*, 490 F.3d at 177 (citing *Toussie*, 323 F.3d at 184). And on the merits, it is not difficult to understand how the factual sufficiency of the pleadings could "overlap" with the qualified immunity question, *i.e.*, whether, based upon *those* facts, the defendants knew or should have known that their conduct violated clearly established law. *See Iqbal*, 556 U.S. at 674–75.

Thus, *Hartman* and *Iqbal* both held that the legal question resolved by this Court was properly within the pendent appellate jurisdiction of the Court of Appeals because it *was* inextricably intertwined with qualified immunity—albeit under a looser standard in *Iqbal* than *amici* believe is appropriate.[8] And *Wilkie* appeared to misconceive both the Court of Appeals' and this Court's jurisdiction, neither of which were at issue given the procedural posture of that case. *See Kirtsaeng* v.

---

8. As noted above, *amici* have concerns about the potential sweep of the Second Circuit's test for pendent appellate jurisdiction. *See ante* at 15 n.2. But the far more important point for present purposes is that even the Second Circuit's approach does not support the Seventh Circuit's exercise of pendent appellate jurisdiction over the question presented in this case. *See id.*

John Wiley & Sons, Inc., 133 S. Ct. 1351, 1358 (2013) ("[W]e are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct."); *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'Ship*, 513 U.S. 18, 24 (1994) ("This seems to us a prime occasion for invoking our customary refusal to be bound by dicta . . . .").

None of these decisions remotely supports the conclusion that the Court of Appeals had pendent appellate jurisdiction to decide the question on which this Court granted certiorari. The Seventh Circuit itself rightly concluded that the cause-of-action question was "irrelevant" to the defendants' qualified immunity. To allow pendent appellate jurisdiction in such a case is thus not merely "to take . . . a small step beyond" *Swint*; "it would in many cases simply abandon it." *Johnson*, 515 U.S. at 315.

II. Although There is No Bar to This Court Reaching the Question Presented, It Should Decline To Do So

a. Reaching the Merits Would Encourage Jurisdictional Bootstrapping By the Lower Courts

As *amici* have acknowledged, this Court has the power to proceed to the merits notwithstanding the jurisdictional defect below. Nevertheless, compelling reasons of prudence, practice, and policy all militate in favor of vacating the decision below

and returning this case to the district court, rather than rewarding the Court of Appeals' jurisdictional bootstrapping.

Reaching the merits of the question on which certiorari was granted would encourage similar jurisdictional bootstrapping by the courts of appeals. That, in turn, would create two related sets of docket pressures: First, as the unanimous Court succinctly put it 18 years ago in *Swint*, "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 49–50.

Once those issues are raised, courts of appeals might be incentivized to reach them either (1) to tee them up for this Court, which clearly *would* have the power to resolve those issues on appeal from the circuit courts; or (2) to resolve them despite the absence of jurisdiction, on the theory that this Court lacks the wherewithal to reverse every instance in which a court of appeals wrongly exercises pendent appellate jurisdiction. And if the courts of appeals are incentivized to reach questions through extensions of pendent appellate jurisdiction doctrine, they can present a multitude of issues to this Court simply by resolving them on interlocutory appeal of a denial of qualified immunity.

Second, even if this Court is willing to supervise such jurisdictional overreaching on a case-

by-case basis, the pressure that such an approach could place on this Court is obvious. After all, the "multi-issue interlocutory appeal tickets" about which *Swint* warned would remain problematic if parties believed that they could routinely invoke *this* Court's jurisdiction via certiorari even on issues that the courts of appeals lacked power to resolve.

Wholly apart from the pressures such an approach would place on the dockets of the courts of appeals and this Court, such interlocutory appeal tickets also would be expensive: "[T]he consequence of such bootstrapping would be to add substantial costs to officer suits, especially those in which the plaintiff ought to prevail on the merits—*i.e.*, those in which these added costs ultimately shouldn't have any bearing on the outcome." Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199, 210 (2013); *see also id.* at 211 (suggesting that these are "costs that the collateral order doctrine specifically exists to minimize, not exacerbate").[9]

---

9. Nor is there anything to the argument that these costs already are incurred by dint of the *proper* appeal of a denial of qualified immunity. *See, e.g.*, *Swint*, 514 U.S. at 45 (noting—and rejecting—the parties' argument that, "[o]nce litigation has already been interrupted by an authorized pretrial appeal, . . . there is no cause to resist the economy that pendent appellate jurisdiction promotes"). This case proves all too well the extent to which a court of appeals' resolution of a "pendent" issue over which it lacked jurisdiction can add substantial economic and non-economic costs to what otherwise would have been a relatively straightforward—and ultimately meritless—qualified immunity appeal. *See also Johnson*, 515 U.S. at 318–19.

b. Reaching the Merits Would Defeat the Analytical Distinction Driving this Court's Application of the Final Judgment Rule and Collateral Order Doctrine

In addition to the potentially substantial costs that such jurisdictional bootstrapping would create, such expansions of pendent appellate jurisdiction risk destabilizing not only the final judgment rule, but also the longstanding distinction this Court has drawn between defenses to liability and immunities from suit.

Although this Court has long cautioned against "play[ing] word games with the concept of a 'right not to be tried,'" *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989), case law has ultimately coalesced around a relatively stable distinction, focusing on whether the "immunity" at issue is, in essence, a right possessed by the defendant to not stand trial *at all*. Even the most complete defenses will not satisfy this exacting standard if they merely establish the defendant's right "not to be subject to a binding judgment of the court," as opposed to his right to avoid being haled into court in the first place. *See, e.g.*, *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988); *see also Will*, 546 U.S. at 353 ("Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable

claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was."). Outside the context of suits against government officers, at least, this distinction is still routinely dispositive as to whether an interlocutory appeal is available. *See, e.g.*, *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc) (holding that the district court's rejection of various defenses by military contractors could not be immediately appealed insofar as they were not immunities from suit).

Leaving the Court of Appeals' jurisdictional analysis undisturbed, and thereby encouraging future courts of appeals to engage in similar jurisdictional bootstrapping, would risk unraveling decades of precedent based upon the bright-line distinctions between these conceptions. "There is certainly no constitutional problem with such a piecemeal arrangement, but it is difficult to reconcile such an approach with the analytical underpinnings of the collateral order doctrine—or with the more fundamental statutory final judgment rule from which that doctrine delicately departs." Vladeck, *supra*, at 212. As then-Justice Rehnquist explained in an analogous context,

> Were we to sustain the procedure followed here, we would condone a practice whereby a district court in virtually any case before it might render an interlocutory decision on the

> question of liability of the defendant, and the defendant would thereupon be permitted to appeal to the court of appeals without satisfying any of the requirements that Congress carefully set forth.

Liberty Mut. Ins. Co. v. *Wetzel*, 424 U.S. 737, 745–46 (1976).

c. As Prior Decisions Recognize, the Appropriate Disposition is to Vacate the Decision Below and Remand With Instructions

Thus, even though this Court *may* exercise jurisdiction to decide the question upon which certiorari was granted, the more appropriate disposition would be to vacate the decision below, and remand with instructions to resolve the interlocutory appeal solely on the basis of qualified immunity—and those issues properly pendent thereto. According to Chief Justice Hughes,

> When it appears, on an appeal to this Court from decree of the Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of Appeals and to remand the case with directions to dismiss the

> appeal to that court for want of jurisdiction.

Stratton v. *St. Louis S.W. Ry. Co.*, 282 U.S. 10, 18 (1930); *see also id.* (citing multiple additional cases to the same effect); *accord. Risjord*, 449 U.S. at 379–80 ("[B]ecause the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits. Consequently, the judgment of the Eighth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction." (citing *Di Bella* v. *United States*, 369 U.S. 121, 132–33 (1962)) (footnote omitted).

Unlike in *Stratton*, the Court of Appeals in this case did not lack jurisdiction over the *appeal*; it merely lacked jurisdiction to reach the issue on which this Court granted certiorari. Nevertheless, the same considerations obtain; in both instances, this Court *could* theoretically review the decision below, but the better part of prudence is for it not to do so.[10] *Cf. Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 648 (2006) (vacating and remanding with

---

10. Nothing would stop this Court from taking advantage of its plenary appellate jurisdiction in an exceptional case in which there are compelling reasons to reach the question presented rather than allow the litigation to proceed apace in the lower courts. *See, e.g., Nixon*, 457 U.S. at 743 n.23; *see also, e.g., Clinton*, 520 U.S. at 689–92. Tellingly, though, neither Petitioners nor Respondent have identified any such compelling reasons here.

instructions to dismiss the appeal for lack of jurisdiction).

But even if this Court is inclined to resolve the question upon which certiorari was granted (on the merits of which *amici* agree with the Court of Appeals), it should not pass up the opportunity to clarify the appropriate scope of pendent appellate jurisdiction under 28 U.S.C. § 1291 in the courts of appeals. As *Swint* suggested, that scope encompasses only whether the trial court's resolution of the pendent issue is "inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or [whether] review of the former decision was necessary to ensure meaningful review of the latter." 514 U.S. at 51.

Whether under the understanding of *Swint* articulated by the Tenth Circuit in *Moore* or the more capacious approach outlined by the Second Circuit in *Toussie*, the Court of Appeals lacked pendent appellate jurisdiction to decide the question on which certiorari was granted—and its jurisdictional bootstrapping must not be left undisturbed.

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that the decision below be affirmed insofar as it affirmed the district court's denial of qualified immunity, vacated insofar as it resolved whether a cause of action can be maintained under § 1983, and remanded for further proceedings.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
4801 Massachusetts Ave., N.W.
Washington, DC 20016
(202) 274-4241

CHARLES S. SIMS
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

Counsel for *Amici Curiae*

APPENDIX

APPENDIX

List of *Amici Curiae* Law Professors
(affiliations provided for identification purposes only)

MICHAEL P. ALLEN
Associate Dean for Faculty Development and
Strategic Initiatives, Professor of Law, and
Director, Veterans Law Institute
Stetson University College of Law

ERWIN CHEMERINSKY
Founding Dean, Distinguished Professor of Law, and
Raymond Pryke Professor of First Amendment Law
University of California-Irvine School of Law

KEVIN M. CLERMONT
Robert D. Ziff Professor of Law
Cornell University Law School

LUMEN N. MULLIGAN
Professor of Law
University of Kansas School of Law

PHILLIP A. PUCILLO
Lecturer in Law
Michigan State University College of Law

EDWARD A. PURCELL, JR.
Joseph Solomon Distinguished Professor of Law
New York Law School

CAPRICE ROBERTS
Professor of Law
Savannah Law School

ANDREW M. SIEGEL
Associate Professor of Law
Seattle University School of Law

ADAM N. STEINMAN
Professor of Law and Michael J. Zimmer Fellow
Seton Hall University School of Law

JOAN E. STEINMAN
Distinguished Professor of Law
IIT Chicago-Kent College of Law

STEPHEN I. VLADECK
Professor of Law and Associate Dean for Scholarship
American University Washington College of Law

HOWARD M. WASSERMAN
Professor of Law
FIU College of Law

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-872

In the Supreme Court of the United States

LISA MADIGAN, ET AL., PETITIONERS

v.

HARVEY N. LEVIN, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 20 OTHER STATES IN SUPPORT OF PETITIONERS

Matthew T. Nelson
Nicole L. Mazzocco
Special Assistant
Attorneys General
Warner Norcross
& Judd LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, MI 48909
BurschJ@michigan.gov
(517) 373-1124

Library of Congress
Law Library

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130

Michael C. Geraghty
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

Dustin McDaniel
Attorney General
State of Arkansas
323 Center St.,
Ste. 200
Little Rock, AR 72201

John W. Suthers
Attorney General
State of Colorado
1300 Broadway
10th FL
Denver, CO 80203

Irvin B. Nathan
Attorney General
District of Columbia
441 4th St., NW
Ste 1100S
Washington, DC 20001

Samuel S. Olens
Attorney General
State of Georgia
40 Capitol Sq., S.W.
Atlanta, GA 30334

David M. Louie
Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

Gregory F. Zoeller
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, Fifth Fl.
Indianapolis, IN 46204

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave.
2nd Fl.
Topeka, KS 66612

Douglas F. Gansler
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

Robert E. Cooper, Jr.
Attorney General
State of Tennessee
425 5th Ave. N.
Nashville, TN 37243

Jim Hood
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Jon Bruning
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

John E. Swallow
Attorney General
State of Utah
P.O. Box 142320
Salt Lake City, UT 84114

Joseph A. Foster
Attorney General
State of New
Hampshire
33 Capitol St.
Concord, NH 03301

Robert W. Ferguson
Attorney General
State of Washington
1125 Washington St. S.E.
P.O. Box 40100
Olympia, WA 98504

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Ave.
Bismarck, ND 58505

J.B. Van Hollen
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act precludes state and local government employees from asserting an age-discrimination claim under 42 U.S.C. § 1983.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 3

I. The ADEA displaces age-discrimination claims under § 1983 3

A. The ADEA's comprehensive scheme evidences Congress's implied intent to displace § 1983. 4

B. The Seventh Circuit's analysis is doubly flawed. 7

1. The Seventh Circuit erred by applying a heightened displacement analysis to constitutional claims. 8

2. The Seventh Circuit erred in holding that differences in the defendants and remedies available under the ADEA and § 1983 prevent preclusion... 11

II. State and local governments should not be treated less favorably than federal and private employers. 13

III. At a minimum, where the ADEA protects a state or municipal government employee, § 1983 actions should be displaced. 25

Conclusion 27

TABLE OF AUTHORITIES

Cases

Baker v. *McCollan*,
443 U.S. 137 (1979) 3

Blessing v. *Freestone*,
520 U.S. 329 (1997) 3

Bond v. *United States*,
131 S. Ct. 2355 (2011) 6

Britt v. *Grocers Supply Co.*,
978 F.2d 1441 (5th Cir. 1992) 5

Brown v. *Gen. Servs. Admin.*,
425 U.S. 820 (1976) ..... passim

Bush v. *Lucas*,
462 U.S. 367 (1983) 12

Davis v. *Passman*,
442 U.S. 228 (1979) 25

EEOC v. *Bd. of Regents of the Univ. of Wis. Sys.*,
288 F.3d 296 (7th Cir. 2002) 7

EEOC v. *Bd. of Supervisors for the Univ. of La. Sys.*,
559 F.3d 270 (5th Cir. 2009) 7

Engquist v. *Or. Dep't of Agric.*,
553 U.S. 591 (2008) 13

Evans v. *City of Bishop*,
238 F.3d 586 (5th Cir. 2000) 6

Fitzgerald v. *Barnstable School Committee*,
555 U.S. 246 (2009) 3, 4

Kimel v. *Florida Bd. of Regents*,
528 U.S. 62 (2000) 6

Lorillard v. *Pons*,
434 U.S. 575 (1978) 5

Lyons v. *Lederle Labs.*,
440 N.W.2d 769 (S.D. 1989) 14

Marrero-Rivera v. *Dep't of Justice of the Commonwealth of Puerto Rico*,
800 F. Supp. 1024 (D.P.R. 1992) 12

Mass. Bd. of Ret. v. *Murgia*,
427 U.S. 307 (1976) 5

Middlesex Cnty. Sewerage Auth. v. *Nat'l Sea Clammers Ass'n*,
453 U.S. 1 (1981) 8

Mt. Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*,
429 U.S. 274 (1977) 6

Office of Lake Cnty. State's Atty. v. *Human Rights Comm'n*,
601 N.E.2d 1294 (Ill. App. Ct. 1992) 24

Preiser v. *Rodriguez*,
411 U.S. 475 (1973) 9, 10, 25, 26

Rancho Palos Verdes v. *Abrams*,
544 U.S. 113 (2005) 3, 4, 10

Schweiker v. *Chilicky*,
487 U.S. 412 (1988) 12

Smith v. *Robinson*,
468 U.S. 992 (1984) ..... passim

Tapia-Tapia v. *Potter*,
322 F.3d 742 (1st Cir. 2003) 1

Waters v. *Churchill*,
511 U.S. 661 (1994) 13

Zombro v. *Baltimore City Police Dep't*,
868 F.2d 1364 (4th Cir. 1989) 4, 13

Statutes

22 Guam Code Ann. §§ 5101, 5201, 3301, 3302..... 23
29 U.S.C. § 623..... 5
29 U.S.C. § 626..... 1, 13
29 U.S.C. § 626(b) 5
29 U.S.C. § 626(d) 4
29 U.S.C. § 633(b) 13
42 U.S.C. § 1981..... 11, 12
42 U.S.C. § 1983..... passim
42 U.S.C. § 2000e-16c 26
42 U.S.C. § 2000e-2..... 12
43 Pa. Cons. Stat. §§ 954, 955 21
745 ILCS 511.5(a) 7
775 Ill. Comp. Stat. § 5/2-101(2)..... 24
775 Ill. Comp. Stat. 5/1-103, 5/2-101 to 5/2-102 16
Ala. Code §§ 25-1-20 to 25-1-21 14
Alaska Stat. §§ 18.80.220, 18.80.300 14
Ariz. Rev. Stat. Ann. §§ 41-1463, 41-1465 14
Ark. Code Ann. §§ 21-3-202 to 21-3-203 14
Cal. Gov't Code (Deering) §§ 12926, 12940..... 15
Colo. Rev. Stat. §§ 24-34-301, 24-34-401, 24-34-402..... 15
Conn. Gen. Stat. §§ 46a–51, 46a–60 15

D.C. Code §§ 2-1401.02, 2-1402.11 15
Del. Code Ann. tit. 19, §§ 710, 711 15
Fla. Stat. §§ 760.02, 760.10; § 112.044..... 15
Ga. Code Ann. §§ 34-1-2; 45-19-22, 45-19-28, 45-19-29..... 16
Haw. Rev. Stat. §§ 378-1 to 378-2 16
Idaho Code Ann. §§ 67-5902, 67-5909, 67-5910..... 16
Ind. Code §§ 22-9-2-1 to 22-9-2-2..... 16
Iowa Code §§ 216.2, 216.6 17
Kan. Stat. Ann. §§ 44-1112 to 44-1113 17
Ky. Rev. Stat. Ann. §§ 18A.140, 344.030, 344.040 .. 17
La. Rev. Stat. Ann. §§ 23:302, 23:311 to 23:312 17
Mass. Gen. Laws ch. 151B, §§ 1, 4 18
Md. Code Ann., State Gov't §§ 20-601, 20-606 17
Me. Rev. Stat. tit. 5, §§ 4553, 4572, 7051 17
Mich. Comp. Laws § 37.2202..... 18
Minn. Stat § 1.05 sub 1..... 7
Minn. Stat. §§ 363A.08, 363A.03, 181.81, 43A.01 ... 18
Miss. Code Ann. § 25-9-149 18
Mo. Rev. Stat. §§ 213.010, 213.055 18
Mont. Code Ann. §§ 49-2-101, 49-2-303, 49-3-201 ... 18
N.C. Gen. Stat. § 143-300.35(a)(2) 7
N.C. Gen. Stat. § 143-422.2, 126-16..... 20
N.D. Cent. Code §§ 14-02.4-02 to 14-03 20
N.H. Rev. Stat. Ann. §§ 354-A:2, 354-A:7 19

N.J. Stat. Ann. §§ 10:5-5, 10:5-12, 10:3-1 19
N.M. Stat. Ann. § 28-1-7 19
N.Y. Exec. Law § 296 19
Neb. Rev. Stat. §§ 48-1002 to 48-1004 19
Nev. Rev. Stat. §§ 613.310, 613.330, 281.370 19
Ohio Rev. Code Ann. §§ 4112.01, 4112.02 20
Okla. Stat. tit. 25, §§ 1301, 1302, tit. 74, § 954 20
Or. Rev. Stat. § 659A.030, § 240.306 20
P.R. Laws Ann. tit. 29, §§ 146, 151; tit. 3, § 1462b.. 23
R.I. Gen. Laws §§ 28-5-6, 28-5-7 21
S.C. Code Ann. §§ 1-13-30, 1-13-80 21
Tenn. Code Ann. §§ 4-21-101, 4-21-401 21
Tex. Lab. Code Ann. §§ 21. 002, 21.101 21
Utah Code Ann. §§ 34A-5-102, 34A-5-106 22
V.I. Code Ann. tit 10, §§ 64, 64a 23
Va. Code Ann. § 2.2-3903, 2.2-2639 22
Vt. Stat. Ann. tit. 21, §§ 495, 495d 22
W. Va. Code §§ 5-11-3, 5-11-9 22
Wash. Rev. Code §§ 49.44.090, 49.60.040, 49.60.180 22
Wis. Stat. §§ 111.32 to 111.33, 111.321 22
Wyo. Stat. Ann. §§ 27-9-102, 27-9-105 23

Constitutional Provisions

S.D. Const. art. VI, § 18 14
U.S. Const. amend I 12

U.S. Const. amend V 25
U.S. Const. amend XIV 4, 5, 7

INTEREST OF *AMICI CURIAE*

The *amici* states and their municipalities employ millions of Americans. Each of the *amici* has adopted statutes, rules, and regulations prohibiting discrimination based on age by its constituent branches, departments, agencies, and political subdivisions. Most *amici* have fair-employment-practices agencies responsible for the enforcement of state and federal anti-discrimination laws. Thus, eradicating unlawful employment discrimination by state and local governmental units is of crucial importance to *amici*.

In enacting the Age Discrimination in Employment Act, Congress prioritized voluntary resolution of employment disputes over litigation. Specifically, the ADEA requires an employee to make a charge of discrimination to the Equal Employment Opportunity Commission before filing suit. The ADEA further requires that the EEOC "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626. And the ADEA imposes a notice requirement and ensures timely initiation of claims.

It is well settled that the ADEA provides the exclusive remedy for age-discrimination claims by employees against the federal government. E.g., *Tapia-Tapia* v. *Potter*, 322 F.3d 742, 745 (1st Cir. 2003). But the Seventh Circuit's decision allows state-government employees to bypass the ADEA's comprehensive remedial scheme and seek relief under § 1983. Under that approach, the *amici*—alone among the nation's employers—are deprived of the benefits of the ADEA's comprehensive process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ADEA creates a far-reaching and detailed statutory scheme for resolving age-discrimination claims. It provides an administrative framework that favors notice, informal resolution of disputes, and timely initiation and resolution of claims. In 1974, Congress extended the ADEA to apply to state and municipal employees.

By contrast, § 1983 creates no substantive rights or protections for the public. Section 1983 is merely a vehicle for the protection of rights granted by other federal laws.

The Seventh Circuit's decision below allows state and local government employees to circumvent the ADEA's comprehensive remedial scheme by bringing age-discrimination claims under § 1983. This approach deprives states and municipalities, alone among employers, of the ADEA's benefits. Under this Court's jurisprudence, Congress's creation of a comprehensive statutory scheme—to prevent age discrimination in a manner broader than the Constitution—precludes the use of § 1983 to vindicate the more limited constitutional right.

This Court should enforce Congress's intent that the ADEA is the only federal remedy for alleged age discrimination by states and municipal governments. Accordingly, the *amici* states respectfully request that this Court reverse the Seventh Circuit and hold that the ADEA displaces § 1983 for age-discrimination claims.

ARGUMENT

I. The ADEA displaces age-discrimination claims under § 1983.

This Court has not considered whether the ADEA displaces a plaintiff's claim for age discrimination under § 1983 against a state or local government employer. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Redress under § 1983 is available only if the plaintiff can demonstrate that the Constitution or a federal statute creates an individually enforceable right in the class of beneficiaries to which the plaintiff belongs. *Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005). Even then, "there is only a rebuttable presumption that the right is enforceable under § 1983" because Congress may have expressly or impliedly forbidden recourse to § 1983. *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997).

The Court has set forth the appropriate analysis to determine whether statutory enactments preclude claims under § 1983, most recently in *Fitzgerald* v. *Barnstable School Committee*, 555 U.S. 246, 252 (2009). The critical inquiry is congressional intent. *Id.* at 252; *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984) (citing *Brown* v. *Gen. Servs. Admin.*, 425 U.S. 820, 825–29 (1976)). Evidence of congressional intent

to displace § 1983 can be found in the statutory text, *Rancho Palos Verdes*, 544 U.S. at 120, inferred because individual enforcement under § 1983 "would be inconsistent with Congress' carefully tailored scheme," *Smith*, 468 U.S. at 1012, and "confirmed by a statute's context," *Fitzgerald*, 555 U.S. at 253. The Court has further explained that where the § 1983 claim asserts a constitutional violation, "lack of congressional intent [to displace § 1983] may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." *Id.* at 252–53. The Court has applied this approach consistently, regardless of whether the cause of action at issue is based on a statutory right or the Constitution.

A. The ADEA's comprehensive scheme evidences Congress's implied intent to displace § 1983.

As Petitioner explains, the ADEA's comprehensive nature and the overlap of rights and protections between the ADEA and the Fourteenth Amendment demonstrate a congressional intent to displace more general actions, like those under § 1983.

1. The ADEA's scheme is detailed and comprehensive. It is "structured to facilitate and encourage compliance through an informal process of conciliation and mediation." *Zombro* v. *Baltimore City Police Dep't*, 868 F.2d 1364, 1366 (4th Cir. 1989).

For example, the EEOC is required to give pre-suit notice to the employer, 29 U.S.C. § 626(d), and must seek to mediate the grievance "by informal methods of conciliation, conference, and persuasion,"

§ 626(b). This comprehensive scheme demonstrates that "Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA." *Britt* v. *Grocers Supply Co.*, 978 F.2d 1441, 1448 (5th Cir. 1992).

2. The ADEA's protections also overlap with the Fourteenth Amendment's protections. The ADEA protects employees who are at least 40 years old from discrimination based on age. 29 U.S.C. § 623. As this Court has stated, "The ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard* v. *Pons*, 434 U.S. 575, 577 (1978).

The Equal Protection Clause prohibits classifications based on age only where the classification is not rationally related to government's legitimate objective. See *Mass. Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 312–14 (1976). The rational-basis standard is "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one," under which legislative action is "presumed to be valid." *Id.*

Thus, while both the ADEA and the Equal Protection Clause protect against age discrimination, the ADEA provides greater protections, subsuming the protections provided by the Equal Protection Clause and enforced under § 1983. This overlap of protection counsels strongly in favor holding that the ADEA's comprehensive provisions displace § 1983 claims. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 485–89 (1973) (preclusion found where the same constitutional rights were protected by habeas corpus scheme and § 1983).

Moreover, correcting the Seventh Circuit's errors and reaffirming the correct displacement analysis is important because myriad federal statutory schemes enforce or implicate other constitutional or statutory rights. The primacy of all these comprehensive congressional schemes must be maintained to achieve Congress's intent. Individuals, like Respondent, should not be allowed to frustrate that intent by resorting to general statutes like § 1983.

The primacy of these schemes is particularly worthy of enforcement because they implement the balance Congress has chosen between protecting federal interests and preserving state sovereignty. In the ADEA, Congress created a system to enforce a right against states, limited to a particular method of enforcement, particular defendants, and particular remedies. Enforcing those limitations is essential to preserve the balance Congress struck. Cf. *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (quotations omitted)).

In the ADEA, Congress overreached its constitutional bounds by seeking to give individuals a cause of action against states.[1] See *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that the ADEA's purported abrogation of

---

[1] Sovereign immunity does not generally prevent suits for money damages under the ADEA against local government units. *Evans* v. *City of Bishop*, 238 F.3d 586, 589 (5th Cir. 2000) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977)).

state sovereign immunity was invalid). But the ADEA's comprehensive scheme nonetheless indicates how Congress intended to limit state sovereignty. The ADEA still provides individuals with an administrative procedure for seeking relief—the ADEA has been held to be enforceable on behalf of individuals by the EEOC. *E.g.*, *EEOC* v. *Bd. of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 272 (5th Cir. 2009); *EEOC* v. *Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 300–01 (7th Cir. 2002). And three states, including Illinois, have enacted statutes waiving sovereign immunity for ADEA claims. 745 ILCS 511.5(a); Minn. Stat § 1.05 sub 1; N.C. Gen. Stat. § 143-300.35(a)(2). Thus, Congress's purpose in providing a comprehensive remedial scheme for age discrimination is not thwarted by the states' sovereign immunity.

In sum, a comparison of the rights and protections of the ADEA and the Fourteenth Amendment, enforced through § 1983, coupled with the comprehensive scope of the ADEA, demonstrate that Congress intended the ADEA to displace § 1983 as the avenue for relief for age discrimination.

B. The Seventh Circuit's analysis is doubly flawed.

The Seventh Circuit reached the incorrect result below because its displacement analysis was flawed. First, the Seventh Circuit erred in applying a heightened standard for constitutional claims. Second, the circuit erred in holding that differences in defendants and remedies available prevented displacement.

1. The Seventh Circuit erred by applying a heightened displacement analysis to constitutional claims.

The Seventh Circuit's analysis of whether the ADEA displaces a government employee's remedies for age discrimination under § 1983 improperly distinguishes between constitutional and statutory rights, applying a higher standard for the displacement of constitutional claims. That distinction is not found in this Court's jurisprudence.

Below, the Seventh Circuit stated, "For the preclusion of *constitutional* claims, we believe more is required than a comprehensive statutory scheme." App. 27a; accord App. 25a ("[W]e have a hard time concluding that Congress's mere creation of a statutory scheme for age discrimination claims was intended to foreclose preexisting constitutional claims."); App. 28a ("In sum, even though the ADEA is a comprehensive remedial scheme, without some additional indication of congressional intent, we cannot say that the ADEA's scheme alone is enough to preclude § 1983 constitutional claims."). But this Court, in focusing on congressional intent, has examined whether a comprehensive statutory scheme exists when considering both statutory claims *and* constitutional claims. The congressional intent inferred from a comprehensive remedial scheme does not change based on the nature of the claim asserted. Compare *Smith*, 468 U.S. at 1012 (constitutional right), with *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (statutory right).

The Seventh Circuit believes that *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and *Smith* v. *Robinson*, 468 U.S. 992 (1984), demonstrate that constitutional claims receive different treatment, noting that the statutes at issue "were specifically designed to address constitutional issues" and that this Court also looked to other indicia of congressional intent. App. 26a–28a. But a review of *Preiser* and *Smith* demonstrates that constitutional claims receive the same congressional-intent inquiry as statutory claims. The comprehensive nature of the statutory scheme was the primary consideration driving the Court's holdings in both cases.

In *Preiser*, the Court emphasized that § 1983 is a "general" statute. 411 U.S. at 489. By contrast, the federal habeas corpus statute "explicitly and historically" provides a remedy for a state prisoner to attack his confinement on constitutional grounds. *Id.* The Court explained:

> It would wholly frustrate explicit congressional intent [that a petitioner exhaust state law remedies before seeking federal relief] to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983. [*Id.* at 489–90.]

Smith reaches the same conclusion regarding the Education of the Handicapped Act ("EHA") and

§ 1983. 468 U.S. at 1009. The Court explained that the EHA establishes a "comprehensive scheme" and creates "a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." *Id.* at 1009–11. Allowing § 1983 claims asserting due-process and equal-protection violations that were "virtually identical to their EHA claims" would "render superfluous most of the detailed procedural protections outlined in the statute." *Id.* at 1009, 1011. "No federal district court presented with a constitutional claim to a public education can duplicate that process" and achieve Congress's objective of "having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *Id.* at 1011–12.

Nor has the Court drawn a distinction between constitutional and statutory claims in later cases. To the contrary, the Court has relied on *Preiser* and *Smith*—each of which addressed constitutional claims—in analyzing whether statutory claims were displaced. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005) (citing *Smith*, 468 U.S. at 1012); *Brown*, 425 U.S. at 833 (citing *Preiser*, 411 U.S. at 489–90). Such reliance would have been inappropriate if the distinction the Seventh Circuit draws was correct.

This Court should reaffirm that the displacement analysis remains the same regardless of whether a statutory or constitutional right is at issue. The comprehensive nature of a statutory scheme is

equally evident of congressional intent to preclude § 1983 suits in both circumstances.

2. The Seventh Circuit erred in holding that differences in the defendants and remedies available under the ADEA and § 1983 prevent preclusion.

The Seventh Circuit also mistakenly relied on differences in defendants and remedies available under the ADEA and § 1983 to avoid the conclusion that the ADEA displaces § 1983. App. 32a–34a. But this Court has never held that such differences prevent a comprehensive statutory scheme from displacing § 1983 remedies.

In *Brown* v. *General Services Administration*, this Court considered whether Title VII provides the exclusive judicial remedy for claims of employment discrimination against the federal government. The plaintiff sued, asserting that he had been subject to race discrimination in violation of Title VII and § 1981. 425 U.S. at 823–24. The plaintiff did not file suit within 30 days of the final agency decision and thus could not assert Title VII claims. See *id.* at 824. The Court considered Title VII's remedial scheme and reasoned that "[t]he balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed to merely supplement other putative judicial relief." *Id.* at 832. The Court concluded "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 833.

Accordingly, the Court held that federal employees' only remedy for unlawful discrimination is Title VII. *Id* at 835. The Court reached this conclusion notwithstanding the fact that Title VII and § 1981, like the ADEA and § 1983, allow for different defendants and remedies. 42 U.S.C. § 1981 (allows individuals to be sued); 42 U.S.C. § 2000e-2 (does not allow individuals to be sued); *Marrero-Rivera* v. *Dep't of Justice of the Commonwealth of Puerto Rico*, 800 F. Supp. 1024, 1031 (D.P.R. 1992) (explaining that until 1991, Title VII and § 1983 offered different remedies).

This Court has reached similar conclusions in the *Bivens* context. In *Bush* v. *Lucas*, 462 U.S. 367, 371 (1983) a federal employee sued his superior for demoting him in violation of his First Amendment rights. The Court held that a federal employee could not maintain such an action because Congress's comprehensive civil-service system addressed such complaints. *Id.* at 380–90. It was of no consequence that the civil-service review process would not result in individual liability and that the plaintiff-employee could not obtain damages for any violations of his constitutional rights. *Id.* This Court declined to second-guess Congress's judgment on these matters. *Id.* at 389; see also *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988) (declining to recognize action for unconstitutional termination of social-security benefits). Thus, again, differences in available defendants and remedies did not affect this Court's analysis, and the Seventh Circuit erred in making such differences dispositive.

II. State and local governments should not be treated less favorably than federal and private employers.

Under the Seventh Circuit's analysis, state and municipal governments—alone among employers—are denied the benefits of the ADEA's comprehensive scheme and its encouragement of "conciliation, conference, and persuasion," 29 U.S.C. § 626. For example, the Seventh Circuit's analysis concludes that Congress intended to require all private employees to exhaust their administrative remedies under state law before filing suit, but not state-government employees. See 29 U.S.C. § 633(b).

The disparate treatment of state and local governments is incongruous, because employment is an area where state and local governments "ha[ve] far broader powers" than in most other contexts in which § 1983 applies. *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id.* Thus, in this sensitive government activity, the states and municipalities should not be afforded the lesser benefits and protections than those afforded to all other employers. See *Zombro*, 868 F.2d at 1369–70 (basing preclusion of § 1983 in part on government employers' need for "wide discretion").

Moreover, the Seventh Circuit's reasoning releases state employees from fulfilling the administrative or other requirements of each state's own law prohibiting age discrimination in employment. Every state and territory but one has a statute that bars age discrimination against public employees, as does the District of Columbia:[2]

Alabama: Ala. Code §§ 25-1-20 to -21 (prohibiting private and public employers from discriminating against persons 40 years of age and older).

Alaska: Alaska Stat. §§ 18.80.220, .300 (prohibiting private and public employers, including the state and a political subdivision of the state, from discriminating on the basis of age).

Arizona: Ariz. Rev. Stat. Ann. §§ 41-1463, -1465 (prohibiting private and public employers from discriminating against persons 40 years of age and older).

Arkansas: Ark. Code Ann. §§ 21-3-202 to -203 (prohibiting public employers from discriminating against persons 40 years of age and older).

---

[2] South Dakota's anti-discrimination statute does not include age as a protected class. But the South Dakota Constitution's equal-protection clause prohibits age discrimination to the same extent as the United States Constitution. See S.D. Const. art. VI, § 18; *Lyons* v. *Lederle Labs.*, 440 N.W.2d 769, 771-72 (S.D. 1989).

California: Cal. Gov't Code (Deering) §§ 12926, 12940 (prohibiting private and public employers, including cities and the state or any political or civil subdivision of the state, from discriminating against persons over 40 years of age).

Colorado: Colo. Rev. Stat. §§ 24-34-301, 401, -402 (prohibiting private and public employers, including the state or any political subdivision, commission, department, institution, or school district thereof, from discriminating against persons at least 40 but less than 70 years of age).

Connecticut: Conn. Gen. Stat. §§ 46a–51, 46a–60 (prohibiting private and public employers, including the state and all political subdivisions, from discriminating on the basis of age).

Delaware: Del. Code Ann. tit. 19, §§ 710, 711 (prohibiting private and public employers, including the state or any political subdivision or board, department, commission, or school district thereof, from discriminating against persons 40 or more years of age).

District of Columbia: D.C. Code §§ 2-1401.02, 2-1402.11 (prohibiting private and public employers from discriminating against persons 18 years of age or older).

Florida: Fla. Stat. §§ 760.02, .10; § 112.044 (prohibiting the private and public employers, including the state, counties, municipalities, and special districts or any subdivision or agency thereof, from discriminating on the basis of age).

Georgia: Ga. Code Ann. §§ 34-1-2; 45-19-22, -28, -29 (prohibiting private and public employers, including any department, board, bureau, commission, authority, or other agency of the state, from discriminating against persons between 40 and 70 years of age).

Hawaii: Haw. Rev. Stat. §§ 378-1 to -2 (prohibiting private and public employers, including the state or any of its political subdivisions, from discriminating on the basis of age).

Idaho: Idaho Code Ann. §§ 67-5902, -5909, -5910 (prohibiting private and public employers, including any agency of or any governmental entity within the state, from discriminating against persons 40 years of age and older).

Illinois: 775 Ill. Comp. Stat. 5/1-103, /2-101 to -102 (prohibiting private and public employers, including the state and any political subdivision, municipal corporation, or other governmental unit or agency, from discriminating against persons 40 years of age and older, but in the case of training or apprenticeship programs, age means 18 but not yet 40 years old).

Indiana: Ind. Code §§ 22-9-2-1 to -2 (prohibiting private and public employers, including the state and all political subdivisions, boards, departments, and commissions thereof, from discriminating against persons at least 40 but under 75 years of age).

Iowa: Iowa Code §§ 216.2, .6 (prohibiting private and public employers, including the state or any political subdivision, board, commission, department, institution, or school district thereof, from discriminating against persons 18 and over and persons considered by law to be an adult).

Kansas: Kan. Stat. Ann. §§ 44-1112 to -1113 (prohibiting private and public employers, including the state and all political subdivisions of the state, from discriminating against persons 40 or more years of age).

Kentucky: Ky. Rev. Stat. Ann. §§ 18A.140, 344.030, .040 (West) (prohibiting private and public employers, including state employers, from discriminating against persons age 40 and over).

Louisiana: La. Rev. Stat. Ann. §§ 23:302, :311 to :312 (prohibiting private and public employers, including the state or any state agency, board, commission, or political subdivision of the state, from discriminating against persons at least 40 years of age).

Maine: Me. Rev. Stat. tit. 5, §§ 4553, 4572, 7051 (prohibiting private and public employers from discriminating on the basis of age and barring discrimination on account of age in state classified and unclassified employment).

Maryland: Md. Code Ann., State Gov't §§ 20-601, -606 (LexisNexis) (prohibiting private and public employers, including the state, from discriminating on the basis of age).

Massachusetts: Mass. Gen. Laws ch. 151B, §§ 1, 4 (prohibiting private and public employers, including the commonwealth and all political subdivisions, boards, departments, and commissions thereof, from discriminating against persons greater than 40 years of age).

Michigan: Mich. Comp. Laws § 37.2202 (prohibiting private and public employers from discriminating on the basis of age).

Minnesota: Minn. Stat. §§ 363A.08, .03 (prohibiting private and public employers from discriminating against persons over the age of majority); § 181.81 (prohibiting private employers from refusing to hire or discharging or demoting an individual because such individual has reached an age less than 70); § 43A.01 (personnel actions by state employers must be based on the ability to perform duties without regard to age).

Mississippi: Miss. Code Ann. § 25-9-149 (prohibiting state employers from discriminating on the basis of age).

Missouri: Mo. Rev. Stat. §§ 213.010, .055 (prohibiting private and public employers, including the state or any political or civil subdivision thereof, from discriminating against persons 40 or more years of age, but less than 70 years of age).

Montana: Mont. Code Ann. §§ 49-2-101, -303 (prohibiting private and public employers from discriminating on the basis of age); § 49-3-201 (state and local government officials shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit without regard to age).

Nebraska: Neb. Rev. Stat. §§ 48-1002 to -1004 (prohibiting private and public employers, including the state, governmental agencies, and political subdivisions, from discriminating against persons 40 years of age or more).

Nevada: Nev. Rev. Stat. §§ 613.310, .330 (prohibiting private and public employers from discriminating on the basis of age); § 281.370 (state, county, or municipal departments, housing authorities, agencies, and boards or appointing officers thereof, shall not refuse to hire or discharge a person from employment, or discriminate in compensation or terms of employment, because of a person's age).

New Hampshire: N.H. Rev. Stat. Ann. §§ 354-A:2, -A:7 (prohibiting private and public employers, including the state and all political subdivisions, boards, departments, and commissions thereof, from discriminating on the basis of age).

New Jersey: N.J. Stat. Ann. §§ 10:5-5, -12 (West) (prohibiting private and public employers, including the state and any political or civil subdivision thereof, from discriminating on the basis of age); § 10:3-1 (prohibiting state, county, and municipal employers from discriminating against individuals of least 40 years of age).

New Mexico: N.M. Stat. Ann. § 28-1-7 (prohibiting private and public employers from discriminating on the basis of age).

New York: N.Y. Exec. Law § 296 (McKinney) (prohibiting private and public employers from discriminating on the basis of age).

North Carolina: N.C. Gen. Stat. § 143-422.2 (it is the public policy of the state to protect the right of all persons to seek, obtain, and hold employment without discrimination on the basis of age by private and public employers); § 126-16 (prohibiting state departments and agencies and local political subdivisions of the state from discriminating against individuals at least 40 years of age).

North Dakota: N.D. Cent. Code §§ 14-02.4-02 to -03 (prohibiting private and public employers from discriminating against individuals at least 40 years of age).

Ohio: Ohio Rev. Code Ann. §§ 4112.01, .02 (LexisNexis) (prohibiting private and public employers, including the state and any political subdivision of the state, from discriminating against individuals at least 40 years old).

Oklahoma: Okla. Stat. tit. 25, §§ 1301, 1302 (prohibiting private and public employers from discriminating against persons at least 40 years of age); tit. 74, § 954 (prohibiting any department or agency of the state from discriminating against persons on the basis of age).

Oregon: Or. Rev. Stat. § 659A.030 (prohibiting private and public employers from discriminating against individuals 18 years of age or older); § 240.306 (state employers' recruiting, selecting, and promoting employees for state classified service must be without regard to an individual's age).

Pennsylvania: 43 Pa. Cons. Stat. §§ 954, 955 (prohibiting private and public employers, including the commonwealth or any political subdivision or board, department, commission, or school district thereof, from discriminating against individuals 40 years of age or older and those protected by further amendment to the federal ADEA).

Rhode Island: R.I. Gen. Laws §§ 28-5-6, 28-5-7 (prohibiting private and public employers, including the state and all political subdivisions of the state, from discriminating against persons at least 40 years of age).

South Carolina: S.C. Code Ann. §§ 1-13-30, -80 (prohibiting private and public employers from discriminating against persons at least 40 years of age).

Tennessee: Tenn. Code Ann. §§ 4-21-101, -401 (prohibiting private and public employers, including the state or any political or civil subdivision thereof, from discriminating against persons at least 40 years of age).

Texas: Tex. Lab. Code Ann. §§ 21. 002, .101 (West) (prohibiting private and public employers, including counties, municipalities, state agencies, state instrumentalities, and individuals elected to public office of the state or a political subdivision of the state, from discriminating against persons 40 years of age or older).

Utah: Utah Code Ann. §§ 34A-5-102, -106 (LexisNexis) (prohibiting private and public employers, including the state, any political subdivision of the state, and a board, commission, department, institution, school district, trust, or agent of the state or its political subdivisions, from discriminating against persons 40 years of age or older).

Vermont: Vt. Stat. Ann. tit. 21, §§ 495, 495d (prohibiting private and public employers, including any governmental body, from discriminating against persons 18 years of age or older).

Virginia: Va. Code Ann. § 2.2-3903 (prohibiting employment practices that violate any Virginia or federal statute or regulation governing age discrimination); § 2.2-2639 (prohibiting employers of more than five but less than fifteen persons from discharging any employee on the basis of age if the employee is 40 years of age or older).

Washington: Wash. Rev. Code §§ 49.44.090, 49.60.040, 49.60.180 (prohibiting private and public employers from discriminating against persons 40 years of age or older).

West Virginia: W. Va. Code §§ 5-11-3, -9 (prohibiting private and public employers, including state, or any political subdivision thereof, from discriminating against persons 40 years of age and older).

Wisconsin: Wis. Stat. §§ 111.32 to .33, 111.321 (prohibiting private and public employers, including the state and each agency of the state, from discriminating against persons at least age 40 or over).

Wyoming: Wyo. Stat. Ann. §§ 27-9-102, -105 (prohibiting private and public employers, including the state or any political subdivision or board, commission, department, institution, or school district thereof, from discriminating against persons at least 40 years of age).

Guam: 22 Guam Code Ann. §§ 5101, 5201 (prohibiting private employers from discriminating on the basis of age); §§ 3301, 3302 (prohibiting private employers and the territory of Guam or any authority, board, commission, department, or institution thereof, from discriminating on the basis of age).

Puerto Rico: P.R. Laws Ann. tit. 29, §§ 146, 151 (prohibiting private employers from discriminating against persons who have reached the minimum age that minors are legally allowed to work); tit. 3, § 1462b (public employers must select, train, promote, and retain employees based on merit, without discrimination by reason of age).

Virgin Islands: V.I. Code Ann. tit 10, §§ 64, 64a (prohibiting private and public employers, including the government and its instrumentalities, from discriminating on the basis of age).

Thus, the states (and territories) have taken significant steps to eliminate age discrimination within their jurisdictions and provided rights *greater* than those provided by the Equal Protection Clause. But the Seventh Circuit's approach would allow plaintiffs to bypass each of these state statutory schemes, rather than properly funneling age-discrimination claims into statutes specifically designed to address them. Indeed, Illinois law provided Respondent with a remedy for age discrimination wholly apart from § 1983 and the ADEA. The Illinois Human Rights Act protects against age discrimination, including claims relating to assistant attorneys general. 775 Ill. Comp. Stat. § 5/2-101(2); *Office of Lake Cnty. State's Atty.* v. *Human Rights Comm'n*, 601 N.E.2d 1294, 1303 (Ill. App. Ct. 1992) (assistant state attorney general was an "employee" within meaning of the Human Rights Act).

Below, the Seventh Circuit concluded that Congress intended to allow state and local government employees asserting age-discrimination claims to circumvent the administrative requirements of both the ADEA and any applicable state law—even though Congress has required that all private employees and all federal government employees fulfill these requirements. This result is incorrect and illogical, and it undermines the uniform application of federal and state anti-discrimination law to state employees.

III. At a minimum, where the ADEA protects a state or municipal government employee, § 1983 actions should be displaced.

The Seventh Circuit posited that the ADEA cannot displace § 1983—even where an ADEA claim is made—because the ADEA limits or exempts certain individuals and types of claims from its scope. App. 33a. But at the very least, § 1983 actions should be displaced where the ADEA provides the plaintiff with a vehicle for vindicating his constitutional rights.

In *Preiser*, for example, this Court held that the federal habeas corpus scheme displaced relief under § 1983. *Preiser*, 411 U.S. at 489–90. The Court acknowledged that the scheme's preclusion may not reach *all* possible lawsuits by a prisoner relating to his confinement. If a prisoner sought a remedy for a violated right that the habeas corpus scheme did not protect, the prisoner would not be precluded from litigating a § 1983 claim where the habeas corpus scheme did not provide a remedy. *Id.* at 499 n.14 (observing that a prisoner could filed an action under § 1983 attacking "the conditions of his confinement").

Likewise, in *Davis* v. *Passman*, 442 U.S. 228 (1979), a congressman informed his secretary in writing that he was terminating her employment because of her gender. *Id.* at 230. The secretary sued for violation of the Fifth Amendment's protections against gender discrimination. *Id.* at 231. The secretary was excluded from the gender-discrimination protections of Title VII because she was a congressional employee. *Id.* at 247. Thus, although the Court had held in *Brown* that Title VII provided

the exclusive remedy for federal-employment discrimination, Title VII did not bar the secretary's suit because Title VII offered the secretary no protection. *Id.* The Court explained that *Brown* only held that Title VII's remedies were exclusive "when those federal employees covered by the statute seek to redress the violation of rights guaranteed by the statute." *Id.* at 247 n.26.

Although the ADEA excludes political and policy-making employees like Respondent from the definition of covered employees, Congress has provided those employees with a procedure to enforce the ADEA through the Government Employee Rights Act of 1991, 42 U.S.C. § 2000e-16c. And as Petitioner explains, that fact is dispositive here. Pet. Br. 41.

Thus, this Court's precedents require that the ADEA displace § 1983 at the very least for all state and local government employees that the ADEA protects. Any other result would allow plaintiffs to "wholly frustrate explicit congressional intent . . . by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489–90.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Matthew T. Nelson
Nicole L. Mazzocco
Special Assistant Attorneys General
Warner Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503
(616) 752-2000

Attorneys for *Amicus Curiae*
State of Michigan

Dated: JUNE 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG - 9 2013
OFFICE OF THE CLERK

No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, *et al.*,
Petitioners,
v.
HARVEY N. LEVIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENT

ALICE O'BRIEN
Counsel of Record
PHILIP A. HOSTAK
National Education Association
1201 16th Street NW
Washington, DC 20036
(202) 822-7035
aobrien@nea.org
phostak@nea.org

Attorneys for Amicus Curiae
National Education Association

August 9, 2013

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. In enacting the ADEA, Congress did not preclude public employees from pursuing Fourteenth Amendment equal protection claims under § 1983	4
II. The purported litigation burdens that Petitioners and *amici* assert to be caused by claims of age-based unequal treatment under the Equal Protection Clause are irrelevant to the preclusion analysis and in any event are grossly exaggerated	20
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:	Page
Ashcroft v. Iqbal, 556 U.S. 662 (2009)	23
Baccus v. Karger, 692 F. Supp. 290 (S.D.N.Y. 1988)	17
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)	23
Blessing v. Freestone, 520 U.S. 329 (1997)	6
Cannon v. University of Chicago, 441 U.S. 667 (1979)	8
City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005)	6
Clark v. Bever, 139 U.S. 96 (1891)	22
Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012)	26
Comm'r of Internal Revenue v. Schleier, 515 U.S. 323 (1995)	20
Fitzgerald v. Barnstable School Committee, 555 U.S. 246 (2009)	*passim*
Gary v. City of Warner Robins, 311 F.3d 1334 (11th Cir. 2002)	17
Gen. Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004)	18
Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148 (D.C. Cir. 2004)	17
Hill v. Borough of Kutztown, 455 F.3d 225 (3d Cir. 2006)	19

TABLE OF AUTHORITIES—Continued

	Page
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)	15, 16, 17
Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976)	5, 15
Medeiros v. Vincent, 431 F.3d 25 (1st Cir. 2005)	23
Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)	6
Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)	19
Nat'l Treasury Emps. Union v. Devine, 591 F. Supp. 1143 (D.D.C. 1984)	17
Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)	26
Smith v. Robinson, 468 U.S. 992 (1984)	8, 11
Stiles v. Blunt, 912 F.2d 260 (8th Cir. 1990)	17
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	20
Vance v. Bradley, 440 U.S. 93 (1979)	16, 23
Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)	26
W. Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985)	16

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND LEGISLATIVE MATERIAL

29 U.S.C. § 623(a)(1) 15

29 U.S.C. § 623(f)(1) 15

29 U.S.C. § 623(j) 18

29 U.S.C. § 630(b) 18

29 U.S.C. § 630(c) 18

29 U.S.C. § 630(d) 18

29 U.S.C. § 630(f) 18

29 U.S.C. § 626(b) 20

42 U.S.C. § 1983 ..... *passim*

Pub. L. 94-142, 89 Stat. 773 (1975) 11

MISCELLANEOUS

Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 Ky. L.J. 235 (2012) 24

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted by the National Education Association ("NEA"), a nationwide employee organization with more than three million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to opposing and eliminating employment discrimination of all kinds and firmly supports the enforcement of the Equal Protection Clause of the Fourteenth Amendment against unconstitutional age discrimination.

NEA submits this brief in support of Respondent to address the proper interpretation of the ADEA and to rebut policy arguments made in the briefs *amici curiae* filed by the National School Boards Association and the Illinois Association of School Boards (collectively referred to as "NSBA") and by the International Municipal Lawyers Association, the Council of State Governments, and the International City/County Management Association (collectively referred to as "IMLA") in support of Petitioners.

SUMMARY OF ARGUMENT

I.A. In enacting the ADEA, Congress did not intend to prohibit public employees from pursuing age-based Fourteenth Amendment equal protection claims under the independent and preexisting authority of § 1983. To the contrary, in enacting the ADEA, Congress created distinct statutory rights and protections for a discrete class of older employees, which are judged by distinct liability standards and enforceable against distinct classes of entities through distinct remedies—all of which differ in sig-

No counsel for a party authored this brief in whole or in part

nificant ways from the rights and protections afforded by the Equal Protection Clause. Under this Court's § 1983 preclusion principles, these differences negate any suggestion that Congress intended the ADEA to preclude age-based equal protection claims under § 1983.

B. Petitioners' contention that the preclusion analysis applicable to this case begins and ends with an examination of the ADEA's enforcement provisions—without any comparison of the rights and protections provided by the ADEA with those provided by the Equal Protection Clause—is inconsistent with this Court's approach to § 1983 preclusion and the logic underling it. Where it is contended that a statute precludes recourse to § 1983 to enforce the statute's own rights and protections, the presence of a comprehensive enforcement scheme within that statute can suffice to demonstrate that Congress intended to preclude suits to enforce the same statute under § 1983. But the considerations are different where it is contended that a statute precludes recourse to § 1983 to enforce constitutional rights. In that setting, an intent not to preclude such claims may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution.

C. The ADEA is governed by a markedly different—and easier to meet—substantive standard of liability than the standard that applies to equal protection claims, covers different classes of employees and employers than does the Equal Protection Clause, and provides different remedies from those available for constitutional violations under § 1983.

These points of divergence compel the conclusion that Congress did not intend the ADEA to preclude public employees from pursuing § 1983 remedies for unequal treatment on the basis of age under the Equal Protection Clause, irrespective of the ADEA's enforcement scheme.

II. There is no merit to the rather paradoxical contention advanced by Petitioners and *amici* NSBA and IMLA that although it is very difficult for plaintiffs to prevail on claims of age-based unequal treatment under the Equal Protection Clause, such claims nonetheless impose significant financial burdens on public employers.

As an initial matter, because the question presented in this case is one of pure statutory interpretation, its resolution does not turn on whether recognition of the availability of § 1983 to enforce pre-existing constitutional rights against irrational age-based actions by public employers does or does not impose significant financial burdens on public employers. Thus, irrespective of the merits of the contention, this Court is the wrong forum in which to make that claim.

In any event, the contention that age-based equal protection claims threaten to impose significant litigation costs on public employers in general, or on school districts in particular, fails on its own terms. That argument both overestimates the ease with which plaintiffs can successfully plead meritless claims that a public employer has engaged in age-based unequal treatment that is violative of the Equal Protection Clause and underestimates the disincentives that

plaintiffs (and, importantly, plaintiffs' attorneys) have to do so. NSBA's contention that age-neutral measures undertaken in response to the requirements of federal and state education regulations, but that disproportionately affect older employees, will expose school districts to disparate impact claims under the Equal Protection Clause rests on a fundamental misapprehension of the law. Contrary to NSBA's professed fears, a plaintiff cannot prevail in an equal protection case under a disparate impact theory.

ARGUMENT

I. In enacting the ADEA, Congress did not preclude public employees from pursuing Fourteenth Amendment equal protection claims under § 1983.

The question presented in this case is one of statutory interpretation—namely, whether, in enacting the ADEA, Congress sought to prohibit public employees from pursuing Fourteenth Amendment claims of unequal treatment on the basis of age under the independent and preexisting authority of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983. We submit that, given the absence of any evidence demonstrating express or implied congressional intent to preclude such Fourteenth Amendment claims—and the textual evidence that Congress intended to create distinct statutory rights and protections in enacting the ADEA—the answer to this question is "no."

At the outset, it is important to emphasize what is not disputed in this case. First, there is no question but that § 1983's longstanding provision of a remedy for

"the deprivation of any rights, privileges, or immunities secured by the Constitution" authorizes public employees to seek judicial remedies for public employer violations of the Fourteenth Amendment's equal protection guarantee, and that, leaving aside the ADEA "preclusion" argument for the moment, that longstanding authorization extends to public employee claims alleging irrational unequal treatment on the basis of age. *See, e.g., Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976). Second, it is undisputed that there is nothing in the text of the ADEA—or for that matter in the legislative history of either the original enactment or in the amendatory act of 1974 extending the ADEA to public employers—expressly stating an intent to preclude public employees from invoking § 1983 to remedy age-based unequal treatment in violation of the Equal Protection Clause.

All this being the case, Petitioners stake their entire argument on the proposition that congressional intent to preclude § 1983 remedies for such constitutional violations is *implied* solely by the existence of the ADEA's enforcement provisions, which require ADEA claimants to exhaust administrative remedies and to participate in informal conflict resolution procedures prior to litigation—to the exclusion of any other statutory analysis. As we show in the following, that mode of analysis is inconsistent with this Court's teaching in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), and that faulty analysis leads Petitioners to the wrong conclusion on the question presented.

A. As this Court recognized in *Fitzgerald*, the question of whether a statute was intended to pre-

clude claims under § 1983's authorization of suits to redress "the deprivation of any rights, privileges, or immunities secured by the ... laws [of the United States]" arises in two distinct categories of cases. *See* 555 U.S. at 252-54. In the first category, the preclusion question arises where Congress enacts legislation that prohibits certain conduct and provides a means for enforcement but is silent on the question of whether the statute's prohibitions are to be enforced solely through that statute's enforcement provisions or whether they can also be enforced pursuant to

In this category of cases, where "the § 1983 claim is based on a statutory right, 'evidence of ... *congressional intent [to preclude § 1983 remedies]* may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Fitzgerald*, 555 U.S. at 252 (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)) (emphasis added). *See also Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). In this setting—where a plaintiff invokes § 1983 to enforce the very same *statutory* provision for which Congress has already prescribed a particular means of enforcement—Congress's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *City of Rancho Palos Verdes*, 544 U.S. at 120, can be sufficient to infer that Congress intended that the statute be enforced exclusively through its own enforcement provisions, *see id.*; *Sea Clammers*, 453 U.S. at 20.

In the second category of cases, the preclusion question arises where Congress has prohibited conduct that can also be the subject of a federal *constitutional* claim pursuant to § 1983's authorization of suits for "the deprivation of any rights, privileges, or immunities secured by the Constitution." *See* 555 U.S. at 252-53. *Fitzgerald* teaches that in such cases, where "the § 1983 claim alleges a constitutional violation," analysis focuses not only on whether the statute's enforcement scheme suggests an implied congressional intent to preclude § 1983 remedies, but also (and critically) on whether "*lack of [such] congressional intent* may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." *Id.* at 252 (emphasis added). "Where the contours of such rights and protections diverge in significant ways," this Court explained, "it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Id.* at 252-53.

Applying this framework to the question presented in *Fitzgerald*—whether Title IX of the Education Amendments of 1972 precluded the plaintiff's § 1983 claim that the defendants' response to allegations of sexual harassment violated the Equal Protection Clause—this Court accordingly looked both to Title IX's enforcement mechanisms *and* to the differences between the rights and protections afforded by Title IX and the Equal Protection Clause, concluding that "[i]n light of the divergent coverage of Title IX and the Equal Protection Clause, as well as the absence of a comprehensive remedial scheme ... Title IX was not meant to be an exclusive mechanism for address-

ing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights." *Id.* at 258.

The *Fitzgerald* Court first determined that Title IX's enforcement mechanisms—an express provision establishing an administrative procedure for the termination of federal funding to institutions found to violate the Act's nondiscrimination provision and an implied private right of action recognized by this Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979)—did not constitute a comprehensive enforcement regime of a type that would suggest "that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim." *Fitzgerald*, 555 U.S. at 256 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

Having found no comprehensive enforcement scheme that would support preclusion, this Court turned to "[a] comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause," 555 U.S. at 256. Engaging in this comparison—which, as the Court made clear, is particular to the preclusion analysis that applies to constitutional claims—this Court found that "Title IX's protections are narrower in some respects and broader in others." *Fitzgerald*, 555 U.S. at 256.

The Court first pointed out that Title IX and the Equal Protection Clause apply to different classes of persons and entities: "Title IX reaches institutions and programs that receive federal funds, which may include nonpublic institutions, but it has consistently

been interpreted as not authorizing suit against school officials, teachers, and other individuals," while "[t]he Equal Protection Clause reaches only state actors" and at the same time "§ 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities." *Id.* (citations omitted).

Also significant to this Court's analysis was the fact that "Title IX exempts from its restrictions several activities that may be challenged on constitutional grounds." *Id.* In particular, "Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions" and "exempts military service schools and traditionally single-sex public colleges from all of its provisions," while some of those "exempted activities may form the basis of equal protection claims." *Id.* (citations omitted).

Furthermore, this Court stressed that "[e]ven where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause, the standards for establishing liability may not be wholly congruent." *Id.* In that regard, this Court noted that "a Title IX plaintiff can establish school district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference" while "[a] plaintiff stating a similar claim via § 1983 for violation of the Equal Protection Clause by a school district or other municipal entity must show that the harassment was the result of municipal custom, policy, or practice." *Id.* at 257-58 (citations omitted).

"Because the protections guaranteed by the two sources of law diverge in this way," this Court found that it could not "agree with the Court of Appeals that 'Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.'" *Id.* at 256 (citation omitted).

B. Petitioners' submission to this Court is that the preclusion analysis applicable to this case begins and ends with an examination of the ADEA's enforcement provisions. Eschewing any effort to compare the rights and protections provided by the ADEA with those provided by the Equal Protection Clause (other than as a predicate for asserting that age-based equal protection claims are burdensome to employers), Petitioners posit that the ADEA's comprehensive enforcement scheme, by itself, conclusively demonstrates that Congress intended the ADEA to preclude public employees from pursuing § 1983 claims of age-based unequal treatment under the Equal Protection Clause. Petitioners' Brief at 11-34. In so doing, Petitioners seek to wave away this Court's extensive discussion of the differences between Title IX's statutory rights and protections and those of the Equal Protection Clause as merely a superfluous buttressing of a conclusion derived wholly from the lack of particularly comprehensive enforcement mechanisms. Petitioners' Brief at 46-47.

That approach is not only facially inconsistent with *Fitzgerald*'s clear holding that "*lack of congressional intent* [to preclude constitutional claims under § 1983] may be inferred from a comparison of the rights and protections of the statute and those

existing under the Constitution," *Fitzgerald*, 555 U.S. at 252 (emphasis added), and this Court's sustained analysis of that issue, *id.* at 256-59, but also with the logic underlying the Court's methodology.[1]

---

[1] While giving short shrift to this court's decision in *Fitzgerald*, Petitioners rely heavily on *Smith v. Robinson*, 468 U.S. 992 (1984), which they characterize as having held that the Education for All Handicapped Children Act of 1974 ("EHA"), as amended, was intended by Congress to be the exclusive means for enforcing the equal protection rights of disabled children to a free public education based solely on the EHA's enforcement scheme. That characterization of *Smith* is inaccurate, for *Smith* only serves to underscore what is missing in this case: An affirmative indication from the text or legislative history of the statute that Congress intended the statute to be a means for enforcing constitutional equal protection rights at all, much less that it intended the statute to be the exclusive avenue for enforcing such constitutional rights.

The 1975 amendment to the EHA at issue in *Smith* expressly referred to the federal interest "assur[ing] equal protection of the law" in its legislative findings and stated that one of the purposes of the rights established by the statute was "to assure that the rights of handicapped children and their parents or guardians are protected." Pub. L. 94-142, §§ 2 & 3, 89 Stat. 773 (1975). Accordingly, the *Smith* Court found that the text and the legislative history of the EHA affirmatively demonstrated (a) that Congress enacted the EHA for the express purpose of creating "the most effective vehicle for protecting the constitutional right of a handicapped child to a public education" by establishing a right of all disabled children to a public education, providing a private right of action to enforce that [illegible], and providing funding to states to help them meet their constitutional obligation to provide special education services, *Smith*, 468 U.S. at 1013; and (b) given that purpose and the EHA's detailed enforcement scheme, "that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute," *id.* at 1009.

As explained above, in *Fitzgerald*, this Court took pains to distinguish the two settings in which § 1983 preclusion analysis arises and to explain the different forms of analysis that each entails.

In the first setting, a plaintiff seeks to use § 1983 to enforce rights or obligations created under a legislative scheme that has its own highly detailed and restrictive enforcement mechanisms—such as the anti-pollution and marine wildlife measures at issue in *Sea Clammers* or the broadcast licensing scheme at issue in *Rancho Palos Verdes*. In that setting, absent an express indication of congressional intent one way or the other, the statute's own enforcement procedures assume paramount importance in the preclusion analysis: There, the mere existence of a detailed and comprehensive enforcement provisions strongly suggests that Congress intended to preclude plaintiffs from enforcing the rights or obligations created by the statute by the direct route that would otherwise be available under § 1983. In such a case, it can fairly be said that direct recourse to the courts via § 1983 would allow circumvention of the statute's carefully wrought methods for enforcing its own substantive terms in a way that is inconsistent with the very existence of those enforcement provisions. *See Fitzgerald*, 555 U.S. at 254-55.

But in the second setting—where, as here, a plaintiff seeks recourse to the courts via § 1983 to enforce not statutorily created rights but long-recognized rights under the Constitution—the considerations are very different. Here, the question is whether, by creating certain substantive rights and protections, along with a comprehensive enforcement scheme, where those

statutory rights and protections apply to at least some circumstances to which the Constitution *also* applies, Congress sought to preclude plaintiffs from enforcing their pre-existing constitutional rights via § 1983. Stated otherwise, the question is not merely whether Congress intended that there be one or two methods for enforcing the same statutory rights, but whether Congress sought to subsume pre-existing constitutional rights that are otherwise enforceable under § 1983 into a statutory scheme creating particular statutory rights and a particular enforcement regime.

In this setting, where there is no affirmative indication of congressional intent that particular constitutional rights and § 1983's provision of a means for enforcing such rights are thus subsumed into a new statute, it is imperative that courts compare the statute's rights and protections with the pre-existing constitutional rights and protections that are asserted to be displaced. The reason for this is plain: If a statute creates substantive rights that bear little resemblance to constitutional rights enforceable under § 1983—because, say, Congress prescribed substantive liability standards that differ markedly from those that apply to the purportedly displaced constitutional rights or Congress chose to protect different classes of persons from those protected by the constitutional right—there is simply no basis for supposing that Congress intended a statute to subsume the pre-existing constitutional right and displace the pre-existing enforcement mechanism of § 1983. Indeed, where the rights and protections of the statute are widely divergent from those of the constitutional right under § 1983, the presence of a statuto-

ry enforcement scheme is of little to no consequence: In such situations, it cannot fairly be said that pursuing § 1983 remedies for the different rights and protections provided under the Constitution works any circumvention of statutorily required procedures.

This is not to say that the presence or absence of a comprehensive enforcement mechanism is irrelevant to the implied preclusion inquiry; indeed the presence of such an enforcement scheme is a necessary condition for such implied preclusion, but it is not sufficient. It cannot be the case—and *Fitzgerald* teaches that it is not the case—that congressional intent to preclude § 1983 remedies for pre-existing constitutional rights can be implied soley from the mere fact that a given statue contains its own comprehensive enforcement mechanisms.

C. Having demonstrated that Petitioners fail to come to grips with *Fitzgerald*'s analysis or the logic underlying it, we turn to the application of that analysis to the circumstances here. Although this case presents a somewhat different pattern from that presented in *Fitzgerald*, the preclusion analysis for constitutional claims applied in *Fitzgerald* compels the same result.

Although the ADEA, unlike Title IX, does contain a comprehensive enforcement scheme, a comparison of the rights and protections afforded by the ADEA with those afforded by the Equal Protection Clause, as applied to claims of age-based unequal treatment, demonstrates that the two diverge widely in their respective liability standards, coverage, and remedies. As developed below, the ADEA is governed by a markedly different—and easier to meet—substantive standard of liability than the standard that

applies to equal protection claims, covers different classes of employees and employers than does the Equal Protection Clause, and provides different remedies from those available for constitutional violations under § 1983. These points of divergence are far more stark than those considered in *Fitzgerald*, and they accordingly compel the conclusion that Congress did *not* intend the ADEA to preclude public employees from pursuing § 1983 remedies for unequal treatment on the basis of age under the Equal Protection Clause, irrespective of the ADEA's enforcement scheme.

The substantive standards governing claims of age discrimination under the ADEA and claims of unequal treatment on the basis of age under the Equal Protection Clause are entirely dissimilar. The ADEA broadly prohibits employment discrimination "against any individual ... because of such individual's age," provided that the employee is forty or more years of age, 29 U.S.C. § 623(a)(1), subject to a number of exceptions, including, prominently, that allowing covered employers to discriminate on the basis of age in circumstances where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," or where the discrimination "is based on reasonable factors other than age," *id.* § 623(f)(1). By contrast, under the Equal Protection Clause, a public employer is permitted to take adverse action against an employee pursuant to an explicitly age-based classification, so long as the age-based classification "is rationally related to a legitimate state interest." *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). *See also Mass. Bd. of Ret. v. Murgia*, 427 U.S.

307, 316 (1976). Under this famously lenient standard of scrutiny, the rationality of the classification is presumed, thus requiring the plaintiff to prove that the "'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Kimel*, 528 U.S. at 84 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). And the governmental decisionmaker may rely on "generalizations" to support the rationality of the age-based classification, such as the use "age as a proxy for other qualities, abilities, or characteristics that are relevant to [its] legitimate interests," even where "age proves to be an inaccurate proxy in any individual case." *Id.* at 84.

As this Court emphasized in *Kimel*, the ADEA's allowance of age discrimination where age is a "bona fide occupational qualification" ("BFOQ") "is a far cry from the rational basis standard [courts] apply to age discrimination under the Equal Protection Clause." *Id.* at 86. Under the ADEA, statutory age discrimination (*i.e.*, adverse employment action undertaken because a person is forty or more years of age) is *prima facie* unlawful "even with [the] BFOQ defense," and that defense is "'meant to be an extremely narrow exception to the general prohibition,'" under which the employer must demonstrate "'a substantial basis for believing that *all or nearly all* employees above an age lack the qualifications required for the position,' or that reliance on the age classification is necessary because 'it is *highly impractical* for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.'" *Kimel*, 528 U.S. at 87 (quoting *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400,

412, 422–23 (1985)) (emphasis added by the *Kimel* Court). In this respect, "the ADEA prohibits very little conduct likely to be held unconstitutional [under the rational basis test]." *Kimel*, 528 at 88.

At the same time, however, the scope of the ADEA's prohibition against age discrimination is both narrower in some respects and broader in other respects than the scope of the Equal Protection Clause's prohibition against irrational age-based classifications.

First, as noted above, the ADEA protects against age discrimination in employment only when an otherwise covered employee is forty or more years of age. The Equal Protection Clause, however, can apply to *any* age-based classification (albeit subject to the rational basis standard).[2] Thus, an irrational

---

[2] *See, e.g., Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1155 (D.C. Cir. 2004) (classifications based on youth are subject to rational basis scrutiny under the Equal Protection Clause); *Gary v. City of Warner Robins*, 311 F.3d 1334, 1337 (11th Cir. 2002) (applying rational basis scrutiny under the Equal Protection Clause to ordinance prohibiting persons under the age of 21 from entering or working at non-eating establishments); *Stiles v. Blunt*, 912 F.2d 260, 269 (8th Cir. 1990) (applying rational basis scrutiny under the Equal Protection Clause to minimum age requirement for state representatives); *Baccus v. Karger*, 692 F. Supp. 290, 301 (S.D.N.Y. 1988) (holding that a state's requirement that one must be at least 18 years of age before beginning law school violated the Equal Protection Clause); *Nat'l Treasury Emps. Union v. Devine*, 591 F. Supp. 1143, 1149 (D.D.C. 1984) (applying rational basis scrutiny under the Equal Protection Clause to retirement statute providing smaller annual cost-of-living adjustments to those under age 62 than those given to those older than 62).

age-based classification disadvantaging workers who are 39 years of age relative to younger workers would violate the Equal Protection Clause, as would an irrational classification disadvantaging *younger* workers relative to older ones. But such irrational age-based classifications would be wholly outside the ADEA. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593 (2004) (observing that the Court's ADEA precedents "show our consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern").

Second, although the Equal Protection Clause can potentially apply to any age-based classifications—and thus is broader in scope than the ADEA in this respect—the state action limitation of the Fourteenth Amendment, and the congruent "color of law" requirement of § 1983, limit the reach of the Equal Protection Clause to age-based classifications in public employment settings. By contrast, the ADEA, as amended in 1974, applies not only to age discrimination by public employers (subject of course to the independent 11th Amendment state sovereign immunity limitation recognized in *Kimel*), but also to private employers, private employment agencies, and labor organizations engaged in industries affecting commerce. *See* 29 U.S.C. § 630(b), (c), and (d). And even so, the ADEA effectively exempts certain public employees from its coverage, *see id.* § 623(j) (permitting otherwise unlawful age discrimination against firefighters and law enforcement officers under specified circumstances) and *id.* § 630(f) (exempting elected officials and certain high-level

employees from the Act's coverage), while no such limitations are recognized under the Equal Protection Clause.

Differences also abound between the Equal Protection Clause and the ADEA with respect to the question of who can be held liable for violations, and under what conditions such liability may be established. Under the Equal Protection Clause, a public employee may sue individuals who caused or participated in the alleged deprivation of equal protection, whereas under the ADEA, only covered employers, employment agencies, and employment agencies may be held liable for statutory age discrimination; individuals, no matter how culpable, are exempt from liability. *See Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006) (collecting cases). And employer liability flows as a matter of course from a finding of age discrimination under the ADEA, under § 1983, a governmental entity may only be held liable if the plaintiff can demonstrate that a violation was caused by a custom, policy or practice of that entity. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)

And finally, the Equal Protection Clause and the ADEA diverge with respect to the remedies available for violations. A public employee who proves a violation of the Equal Protection Clause may recover not only backpay and attorneys' fees, but also compensatory and, in appropriate cases, punitive damages. Under the ADEA, however, compensatory damages for pain and suffering or emotional distress are prohibited, and the only exemplary damages that can be awarded are liquidated damages in the form of double backpay in cases involving willful viola-

tions. *See* 29 U.S.C. § 626(b); *Comm'r of Internal Revenue v. Schleier*, 515 U.S. 323, 326 (1995); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985).

As the foregoing catalogue demonstrates, the "rights and protections of the statute and those existing under the Constitution" plainly "diverge in significant ways." *Fitzgerald*, 555 U.S. at 252-53. Indeed, the rights and protections of the ADEA differ from those of the Equal Protection Clause so much more starkly than do the statutory and constitutional provisions considered in *Fitzgerald* that it is not simply "[un]likely that Congress intended to displace § 1983 suits enforcing constitutional rights," *id.* at 253, but positively implausible.

In enacting the ADEA, Congress created distinct statutory rights and protections for a discrete class of older employees, which are judged by distinct liability standards and enforceable against distinct classes of entities through distinct remedies. In this setting, the presence of a comprehensive enforcement scheme in the ADEA carries little significance in the preclusion analysis. While the ADEA's rights and protections surely are enforceable only through the ADEA's procedures, the distinctness of those rights and protections negates any inference of preclusion that might otherwise be drawn from the statute's enforcement scheme.

II. The purported litigation burdens that Petitioners and amici assert to be caused by claims of age-based unequal treatment under the Equal Protection Clause are irrelevant to the preclusion analysis and in any event are grossly exaggerated.

Petitioners, echoed by *amici* NSBA and IMLA, seek to bolster the preclusion argument with the rather paradoxical contention that although it is very difficult for plaintiffs to prevail on claims of age-based unequal treatment under the Equal Protection Clause, such claims nonetheless impose significant financial burdens on public employers. *See* Petitioners' Brief at 38-45; NSBA Brief at 4-7, 16-23; IMLA Brief at 5-18. This contention, as we show in the following, is entirely beside the point of the question presented to this Court and in any event is wholly conjectural and grossly exaggerated.

As an initial matter, we must emphasize an obvious, but critical, point: The question presented in this case does not turn on whether recognition of the availability of § 1983 to enforce pre-existing constitutional rights against irrational age-based actions by public employers does or does not impose significant financial burdens on public employers. Rather, the question presented here is one of pure statutory interpretation—to wit, whether, under this Court's implied preclusion principles, the ADEA's enforcement provisions evince an implied congressional intent to preclude such claims.

Consequently, irrespective of the merits of the contention that § 1983 claims by public employees alleging irrational age-based treatment under the Equal Protection Clause are financially burdensome to public employers, this is the wrong forum in which to make that claim. Any contention that such claims *should be* precluded, based on public employers' experience of claims for pre-existing constitutional rights under the longstanding private enforcement authorization of §

1983, is one for Congress alone to weigh. *See Clark v. Bever*, 139 U.S. 96, 106 (1891) ("It is not for the courts, by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation."). And there is no evidence that any such concerns were presented to Congress—or acted upon by Congress—when the ADEA was enacted or amended.

The foregoing is a complete answer to the policy arguments made by Petitioners and by *amici* NSBA and IMLA. Nonetheless, we pause to note that those arguments are flawed even when considered on their own terms.

The common element in the policy arguments advanced by Petitioners and *amici* NSBA and IMLA is the idea that, notwithstanding the fact that it is very difficult for public employees to prevail on claims alleging irrational age-based treatment under the Equal Protection Clause, liberal pleading standards make it possible for plaintiffs with ultimately meritless equal protection claims to easily survive motions to dismiss and thereby impose on public employers the burdens and costs of extensive discovery. From that premise, Petitioners and *amici* NSBA and IMLA make the cognitive leap of suggesting that plaintiffs are likely to do so in sufficient numbers for those discovery costs to be significant in the aggregate. *See* Petitioners' Brief at 41-44; NSBA Brief at 19-21; IMLA Brief at 3, 15-181. Both the underlying premise and the conjectural conclusion are flawed.

First of all, this line of argument overestimates the ease with which plaintiffs can successfully plead meritless claims that a public employer has engaged

in age-based unequal treatment violative of the Equal Protection Clause, and thereby secure wide-ranging discovery, under contemporary pleading standards—including, notably, those established by this Court's decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). At the same time, this contention underestimates the disincentives that plaintiffs (and, importantly, plaintiffs' attorneys) have to do so.

At the most basic level, "the daunting burden," *Medeiros v. Vincent*, 431 F.3d 25, 31 (1st Cir. 2005), facing plaintiffs under the rational basis standard of scrutiny that applies to age-based classifications means that, to survive a motion to dismiss, such a plaintiff's complaint must contain "well-pleaded factual allegations," rather than mere conclusions, that "plausibly give rise to an entitlement to relief," *Iqbal*, 556 U.S. at 681—*i.e.*, factual allegations establishing that the employer's age-based adverse employment action "is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [employer's] action[] w[as] irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). It should be needless to add that ultimately meritless age-based equal protection claims are not, as Petitioners suggest, "easy to plead," Petitioners' Brief at 44, at least not with any hope of surviving a motion to dismiss.

As a consequence, there is, contrary to suggestions by Petitioners and *amici* NSBA and IMLA, little incentive for plaintiffs, and plaintiffs' attorneys, to assert age-based equal protection claims except in the most egregious cases. In this regard, it is telling

that neither Petitioners nor *amici* NSBA and IMLA offer any empirical evidence[3] that meritless age-based equal protection claims survive motions to dismiss at a rate sufficient to impose significant discovery costs on public employers. And, although our research has uncovered no data on the precise type of claims at issue here, the empirical evidence that is available on the effect of this Court's decisions in *Twombly* and *Iqbal* on the survival rate of discrimination claims more generally suggests otherwise.[4]

---

[3] To be sure, Petitioners (Brief at 43-44) attempt to bootstrap the discovery conducted in this case as support for their more general contention. That attempt is unavailing, even apart from the dictum that anecdote is not data, because in the district court, Levin raised multiple claims, including claims of sex discrimination under Title VII and age discrimination under the ADEA. There is no indication from the record that the discovery conducted below was attributable in any significant degree to Levin's equal protection claim in particular. Indeed, given that the nature of all Levin's claims entails discovery into the reasons for his employer's adverse action—and that that is precisely the discovery inquiry that Petitioners allude to—there is no reason to suppose that the equal protection claim itself made a marginal difference in the nature or amount of discovery conducted below.

[4] *See, e.g.*, Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 Ky. L.J. 235 (2012). This study, which examined employment and housing discrimination cases, reports that 72% of post-*Iqbal* cases are dismissed, and that 50% of post-*Iqbal* cases are dismissed with prejudice, which rates constitute a significant increase from the already-high pre-*Twombly* rates (61% of pre-*Twombly* discrimination cases dismissed, and 46% dismissed with prejudice). *Id.* at 260-61. The study also reports that the number of motions to dismiss based on specificity of the pleadings "accelerated considerably" after *Iqbal* was decided. *Id.* at 281.

Beyond that, *amicus* NSBA breathlessly urges that age-based equal protection claims threaten to "handcuff public school districts and public school officials in meeting personnel-related challenges . . . and accomplish[ing] their educational mission." NSBA Brief at 2. In support of this contention, NSBA offers the following syllogism:

Given (1) that federal and state education regulations mandate that school districts implement education measures that, given school districts' aging workforces, entail "decisions with age-related implications," NSBA Brief at 4-5; and (2) that "it is not difficult to envision a claim by a single disaffected teacher over the age of 40 or a class of teachers claiming that the assignment of teachers under the age of 40 to work in such programs is statistically disparate and therefore ... sufficient to trigger liability under § 1983," *id.* at 6; it therefore follows that "the specter of § 1983 litigation" raising such claims "has the potential to affect [school district] decisions [on education measures unrelated to age] in a manner that disserves the educational mission of America's public schools," *id.*

We need not quarrel with the first premise underlying NSBA's chain of reasoning—*i.e.*, that education regulations require school district actions that result in statistically adverse consequences for older education employees—because the NSBA's conclusion is based entirely on a fundamental misapprehension of the law governing equal protection claims. Contrary to NSBA's view that "Section 1983 jurisprudence has not evolved to deal with the fine contours of unique theories of recovery such as claims based on disparate impact," *id.* at 7, the law is quite clear on this

score: Because the Equal Protection Clause imposes liability only for *purposeful* discrimination, a plaintiff cannot prevail in an equal protection case under a disparate impact theory. *See, e.g., Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1337 (2012) ("[Disparate impact] evidence alone is insufficient [to prove a constitutional violation], even where the Fourteenth Amendment subjects state action to strict scrutiny." (quotation marks and citations omitted)); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

Consequently, even leaving to one side the difficulty of effectively pleading age-based equal protection claims, NSBA's argument that school districts are uniquely vulnerable to age-based equal protection claims is wholly meritless.

* * * *

In sum, the policy arguments in support of preclusion offered by Petitioners and *amici* NSBA and IMLA are not only irrelevant to the pure issue of statutory construction presented in this case, they are meritless even on their own terms.

The potential for liability for violations of the Equal Protection Clause poses no unjustifiable bur-

dens on public employers generally or school districts in particular.

CONCLUSION

For the foregoing reasons, *amicus* NEA requests that this Court conclude that the ADEA does not preclude § 1983 enforcement of equal protection claims for age discrimination under the Fourteenth Amendment.

Respectfully submitted,

ALICE O'BRIEN
Counsel of Record
PHILIP A. HOSTAK
National Education Association
1201 16th Street NW
Washington, DC 20036
(202) 822-7035
aobrien@nea.org
phostak@nea.org

Attorneys for Amicus Curiae *National Education Association*

August 9, 2013

AMICUS CURIAE BRIEF

FILED
JUN 10 2013
OFFICE OF THE CLERK

No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, IN HER INDIVIDUAL CAPACITY, ANN SPILANE, ALAN ROSEN, ROGER P. FLAHAVEN, AND DEBORAH HAGAN

Petitioners,

v.

HARVEY LEVIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AND ILLINOIS ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITIONERS

Francisco M. Negrón, Jr.*
General Counsel
Nat'l School Boards Assoc.
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Robert J. Sniffen
Sniffen & Spellman, P.A.
123 North Monroe St.
Tallahassee, FL 32301
(850) 205-1996

*Counsel of Record

June 10, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **iii**

STATEMENT OF INTEREST OF AMICI **1**

SUMMARY OF THE ARGUMENT **2**

ARGUMENT **4**

I. THE SEVENTH CIRCUIT DECISION HANDCUFFS SCHOOL DISTRICTS AND PUBLIC SCHOOL OFFICIALS IN MEETING THE CHALLENGES OF OUR NATION'S PUBLIC SCHOOLS 4

II. EXPANSIVE FEDERAL AND STATE LAWS ALREADY PROTECT SCHOOL EMPLOYEES, OBVIATING THE NEED FOR EXPANSION OF 42 U.S.C. § 1983 TO COVER CLAIMS OF AGE DISCRIMINATION IN THE SCHOOL CONTEXT 8

A. The ADEA offers ample protection to school employees from age discrimination 8

B. The ADEA's voluntary resolution process and expansive remedies encourage compliance by school district employers 11

C. School district employees have additional protections under state antidiscrimination laws, collective bargaining agreements, civil service laws and school district established grievance procedures 13

D. Notwithstanding the many protections afforded school district employees, the Seventh Circuit unnecessarily expanded the scope of 42 U.S.C. § 1983 to cover age discrimination 14

III. EXISTING REMEDIES AVAILABLE TO EMPLOYEES ARE LESS COSTLY, LESS BURDENSOME, AND MORE ALIGNED WITH CONGRESSIONAL INTENT THAN EXPENSIVE, TIME-CONSUMING CONSTITUTIONAL LITIGATION 16

A. The ADEA's comprehensive administrative scheme promotes the statute's purpose to eliminate unlawful discrimination quickly and precludes the need for a Section 1983 claim 17

B. Constitutional claims under Section 1983 impose litigation burdens on both parties that prolong and complicate the resolution of age discrimination complaints without providing greater protection or more effective remedies 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases:

Anderson v. Crieghton,
483 U.S. 635 (1987) 21

Backe v. LeBlanc,
691 F.3d 645 (5th Cir. 2012) 20

Behrens v. Pelletier,
516 U.S. 299 (1996) 21

Birkbeck v. Marvel Lighting Corp.,
30 F.3d 507 (4th Cir. 1994) 22

Brennan v. Metropolitan Opera Ass'n,
192 F. 3d 310 (2d Cir. 1999) 8

Butler v. City of Prairie Village,
172 F.3d 736 (10th Cir. 1989) 22

Cadiz v. Kruger,
2007 WL 4293976 (N.D. Ill. 2007) 20

Chapman v. AI Transp.,
229 F.3d 1012 (11th Cir. 2000) (*en banc*) 15

Fantini v. Salem State College,
577 F.3d 22 (1st Cir. 2009) 22

Fitzgerald v. Barnstable Sch. Cmte.,
555 U.S. 246 (2009) 18

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 21

Hill v. Borough of Kutztown,
455 F.3d 225 (3d Cir. 2006) 22

Horwitz v. Board of Educ. of Avoca Sch. Dist. No. 37,
260 F.3d 602 (7th Cir. 2001) 22

Langford v. City of Elkhart,
1992 WL 404443 (N.D. Ind. 1992) 20

Lillard v. Shelby County Bd. of Educ.,
76 F.3d 716 (6th Cir. 1996) 20

Martin v. Chemical Bank,
129 F.3d 114 (2d Cir. 1997) 22

Medina v. Ramsey Steel Co.,
238 F.3d 674 (5th Cir. 2001) 22

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,
453 U.S. 1 (1981) 18, 19

Millay v. Surray Sch. Dep't,
707 F.Supp.2d 56 (D. Maine 2010) 18

Miller v. Maxwell's Int'l Inc.,
991 F.2d 583 (9th Cir. 1993) 22

Mitchell v. Forsythe,
472 U.S. 511 (1985) 21

Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) 6, 19

Occidental Life Ins. v. EEOC, 432 U.S. 355 (1977) 17

Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 18

Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008) 19

Sabouri v. Ohio Dep't of Educ., 142 F.3d 436 (6th Cir. 1996) 22

Shikles v. Sprint/United Management, 426 F.3d 1304 (7th Cir. 2001) 17

Smith v. City of Jackson, 544 U.S. 228 (2005) 9

Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995) 22

Smith v. Robinson, 468 U.S. 992 (1984) 18

Trans World Air Lines v. Thurston, 469 U.S. 111 (1985) 12

Vodak v. City of Chicago, 2004 WL 1381043 (N.D. Ill. 2004) 20

Williams v. Bd. of Regents,
477 F.3d 1282 (11th Cir. 2007) 21

Wilson v. Garcia,
471 U.S. 261 (1985) 23

Statutes and Regulations

20 U.S.C. § 1401(3)(a) (2013) 4
20 U.S.C. § 1681(a) (2013) 18
20 U.S.C. § 1703 (2013) 5
20 U.S.C. § 6301 *et seq.* (2013) 4

29 U.S.C. § 621 *et seq.* (2013) 2
29 U.S.C. § 623(d) (2013) 9
29 U.S.C. § 623(i) (2013) 9, 10
29 U.S.C. § 626 (2013) 12
29 U.S.C. § 626(b) (2013) 12, 13
29 U.S.C.§ 626(c)(1) (2013) 12
29 U.S.C. § 626(d) (2013) 17, 18
29 U.S.C. § 626(f) (2013) 8, 10
29 U.S.C. § 626(f)(1)(B), (F), (G) (2013) 10
29 U.S.C. § 626(f)(1)(F)(ii) 11
29 U.S.C. § 626(f)(1)(H) 11
29 U.S.C. § 626(i) (2013) 9

42 U.S.C. § 1983 (2013) ..... passim
42 U.S.C. § 11431 *et seq.* (2013) 5

Other Authorities

Facts About Age Discrimination,
http://www.eeoc.gov/facts/age.html. 9, 10

Grievance Procedure of Raymore-Peculiar School District, available at http://www.raypec.k12.mo.us.index.aspx?NID=813 14

National Center for Education Statistics (NCES), *Fast Facts*, nces.ed.gov/FastFacts/display.asp?id=28 5

STATEMENT OF INTEREST OF AMICI[1]

The National School Boards Association ("NSBA") is a not-for-profit organization of state associations of school boards and their approximately 13,800 member districts across the United States, which employ almost 6.4 million people. Taken as a whole, the public school districts represented by NSBA constitute the single largest government employer in the nation and are responsible for educating more than 50 million public school students.

The Illinois Association of School Boards ("IASB") is a voluntary organization of 98% of local boards of education in the State of Illinois dedicated to strengthening the public schools through local citizen control. IASB is organized by member school boards as a private not-for-profit corporation under authority granted by Article 23 of The Illinois School Code. IASB programs are designed to provide leadership, service and advocacy for local school boards.

Amici seek to foster excellence and equity in public education through school board leadership. *Amici* support the reasonable application of anti-

---

[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. In accordance with Supreme Court Rule 37.3, counsel for both parties have granted consent to this brief, and the requisite consent letters have been filed with the Clerk of this Court.

discrimination laws that balance the rights of public school employees with the educational and fiscal challenges facing public schools. In this case, *Amici* seek to demonstrate how Petitioners' argument, if accepted, would handcuff public school districts and public school officials in meeting personnel-related challenges necessary to operate public schools and would hamper school districts' ability to accomplish their educational mission. Further, *Amici* seek to provide the Court with argument and authority in support of its contention that federal and state anti-discrimination laws already contain comprehensive and adequate remedies for age discrimination, and that the unnecessary expansion of 42 U.S.C. § 1983 (2013) will needlessly lead to costly, time-consuming litigation for public school districts and public school officials.

SUMMARY OF THE ARGUMENT

In the face of reduced budgets and unprecedented reform directives, school district employers are working hard to innovate and improve student achievement with experienced and aging staffs. If this Court expands the scope of 42 U.S.C. § 1983 to cover age discrimination in employment, which is already encompassed by the comprehensive provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (2013), and state and local requirements, school boards and their members will face the specter of additional liability (in both their official and individual capacity) as they attempt to bring about unprecedented change. This expansion of Section 1983's reach is unnecessary to

protect aging employees, and unnecessarily burdensome on school district employers called upon to do more and more with less and less.

These employers must already comply with the ADEA, passed by Congress in 1967 to eradicate age discrimination in the workplace. The ADEA provides broad relief for aggrieved individuals and empowers the U.S. Equal Employment Opportunity Commission ("EEOC") to secure voluntary compliance with the law through its investigation and conciliation functions. In addition to the ADEA, state anti-discrimination laws, collective bargaining agreements, civil service laws and school-district established grievance procedures provide ample remedies to school employees who assert age discrimination claims.

In expanding the scope of 42 U.S.C. § 1983 to cover age discrimination in employment, the Seventh Circuit provided an unnecessary, redundant and costly remedy to public employees, including school district employees. Section 1983 litigation routinely involves multiple parties and wide-ranging discovery. The attention and resources that must be expended by school districts and school officials to defend Section 1983 claims distracts from accomplishing the educational mission with which they are tasked and is wasteful when the claim is cognizable under other laws. In addition, school officials may face individual capacity claims for legitimate employment decisions made for educational reasons.

The Seventh Circuit's decision departs from the majority view of the circuit courts of appeals that have faced the same question and should be reversed

by this Court. America's public schools must be free from additional and redundant litigation so they can meet the challenges of preparing students for the world that awaits them.

ARGUMENT

I. THE SEVENTH CIRCUIT DECISION HANDCUFFS SCHOOL DISTRICTS AND PUBLIC SCHOOL OFFICIALS IN MEETING THE CHALLENGES OF OUR NATION'S PUBLIC SCHOOLS

America's public schools face unprecedented challenges and are under increased pressure to do more with less. Public schools must comply with legislative dictates passed each year at both the federal and state levels. On the federal level, the challenges presented by the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2013), to meet Adequate Yearly Progress relentlessly permeate districts' operations. Numerous other federal statutory requirements put pressure on school officials to meet the needs of a diverse student body while providing a free public education to all who cross the threshold of the schoolhouse door. For example, public schools must meet the expansive mandates contained in laws such as the Individuals with Disabilities Education Improvement Act, which requires public schools to provide individualized free appropriate public education to students with disabilities, 20 U.S.C. § 1401(3)(a) (2013); the McKinney-Vento Homeless Assistance Act, which

requires public schools to meet the unique needs of homeless youth, 42 U.S.C. § 11431 *et seq.* (2013); and the Equal Educational Opportunity Act of 1974, which requires that public schools assist non-native English speaking students to help them overcome language barriers and participate equally in the educational program, 20 U.S.C. § 1703 (2013). At the state level, each legislative session brings a host of new laws and some otherwise unconventional methods of teaching students in various settings (*e.g.*, home-schooling).

At the same time, the K-12 teaching workforce is aging rapidly. According to the National Center for Education Statistics (NCES), among full-time and part-time public school teachers in 2007-08, 56% were over the age of 40.[2] During this same period of time, 7.6% of all full-time and part-time public school teachers were moved to a different school at some point in the school year. Many times these employees (referred to in the NCES data as "movers") are placed in low-performing schools to improve student learning as part of a school district's reform efforts. Other times these "movers" are reassigned to deal with changing enrollment trends school districts often encounter based upon population movement and other socio-economic realities within the district.

Other educational needs can result in decisions with age-related implications. For example, teachers who have recently completed teacher preparation programs in fields such as English Language Learners ("ELL") programs and computer technology literacy tend to be younger. School

---

[2] *See* nces.ed.gov/FastFacts/display.asp?id=28.

districts should be free to hire and place individuals they believe are best qualified to teach ELL and technology skills irrespective of seniority or the impact such assignments may have on older workers; but the specter of Section 1983 litigation for age discrimination claims has the potential to affect those decisions in a manner that disserves the educational mission of America's public schools. Even under the strain of establishing liability under *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), it is not difficult to envision a claim by a single disaffected teacher over the age of 40 or a class of teachers claiming that the assignment of teachers under the age of 40 to work in such programs is statistically disparate and therefore indicative of a "custom, policy or practice" sufficient to trigger liability under Section 1983.

Similarly, other employment decisions that favor recently trained teachers and administrators may adversely affect older workers, but are made without regard for the age of these employees. Public school districts faced with various federal and state mandates must be free to assign the most appropriate personnel to serve the needs of students to comply with these mandates and to otherwise provide the best possible education for students.

The financial strain many school districts have faced may also necessitate decisions by school districts with respect to salary and benefit cuts that could adversely impact older workers. For example, a public school district's decision to change its retirement benefit program will undoubtedly impact employees who are closer to retirement age more than employees who will not retire for many years. It

is untenable to put the cloud of constitutional litigation over elected officials and school administrators who are charged with the difficult task of making hard financial decisions during difficult times.

In the final analysis, the potential for personal liability under Section 1983 for otherwise neutral actions that tend to impact older workers disparately makes it difficult for an already burdened public school system to recruit and retain qualified school officials. The defenses available under the ADEA in disparate impact claims (i.e., that liability will not lie where an otherwise neutral employment decision is based on reasonable factors other than age) are designed to address such claims. By contrast, Section 1983 jurisprudence has not evolved to deal with the fine contours of unique theories of recovery such as claims based upon disparate impact. It is difficult to justify the years of litigation that would be necessary for these types of defenses to be advanced in Section 1983 litigation when one considers the financial and temporal drain such litigation would have on public school officials.

II. EXPANSIVE FEDERAL AND STATE LAWS ALREADY PROTECT SCHOOL EMPLOYEES, OBVIATING THE NEED FOR EXPANSION OF 42 U.S.C. § 1983 TO COVER CLAIMS OF AGE DISCRIMINATION IN THE SCHOOL CONTEXT

A. The ADEA offers ample protection to school employees from age discrimination.

By any measure, the comprehensive scheme created by the ADEA and its amendments provides adequate protections for employees 40 and over from discrimination based on age, such that expanding 42 U.S.C. § 1983 to also cover age discrimination in employment would be superfluous.

The ADEA covers employers that employ 20 or more individuals, as well as state and local governments, employment agencies, labor organizations and the federal government. 29 U.S.C. § 626(f) (2013). The ADEA is sweeping in its scope, and protects employees and applicants from discrimination on the basis of age with respect to the terms, conditions or privileges of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments and training. *Id.* at § 623(a). An individual may bring an action for a "hostile work environment" based on age. *E.g.*, *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999) (citations omitted). In 2005, the protections of the ADEA were extended to

employment decisions that disparately impact older workers. *Smith v. City of Jackson*, 544 U.S. 228 (2005). The EEOC, which enforces the ADEA, has interpreted the statute to allow employers to favor workers who are 40 years of age or older, even when doing so negatively impacts younger workers under the age of 40. *See Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html.

The ADEA also contains an anti-retaliation clause that protects individuals who oppose discriminatory, age-related employment practices and those who file a charge of discrimination, or who participate or testify in an investigation, proceeding or litigation of a claim under the ADEA. 29 U.S.C. § 623(d) (2013). Less obvious aspects of the employment relationship also fall within the ambit of the ADEA. For example, the ADEA prohibits discrimination in apprenticeship programs and regulates job notices and advertisements. *Id.* at § 623(e). *Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html. The statute also prohibits discrimination in employee benefit plans such as health coverage and pensions. 29 U.S.C. § 623(i) (2013). Further, according to the EEOC, while the ADEA does not expressly prohibit age-related inquiries, "because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA." *Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html

The ADEA also contains unique protections not found in any other federal equal employment opportunity law. In 1990, Congress amended the ADEA through the passage of the Older Workers Benefit Protection Act ("OWBPA") 29 U.S.C. § 626(f)(1)(B), (F), (G) (2013), which allows employers "in limited circumstances" to reduce benefits based on employee age, but only if "the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers." *Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html; *see also* 29 U.S.C. § 623(i) (2013). Thus, the aging school work force is protected from attempts by school districts to hand the burden of budgetary constraints to them through reduced benefits.

The OWBPA also amended the ADEA to require any waiver of an age discrimination claim to meet certain standards to ensure the waiver is given knowingly and voluntarily. To secure a valid waiver of an ADEA claim, the written waiver of claims tendered by the employer must specifically refer to ADEA rights or claims; not waive rights or claims that may arise in the future; be in exchange for valuable consideration; advise the individual in writing to consult an attorney before signing the waiver; and provide the individual at least twenty-one days to consider the agreement and at least seven days to revoke the agreement after signing it. *Id.* at § 626(f). School districts wishing to secure waivers of ADEA claims must comply with the strict requirements of the statute.

Under OWBPA school districts offering early retirement incentive plans must also clear certain

thresholds when separating an employee in connection with an exit incentive or other employment termination program that impacts two or more employees. Instead of twenty-one days, an employee must be afforded at least forty-five days to consider a separation agreement before signing and an additional seven days to revoke the agreement. *Id.* at § 626(f)(1)(F)(ii). In either case, the agreement is not effective or enforceable until after the expiration of the revocation period. School districts, like all covered employers, are also required to provide certain information to employees in writing, including information regarding: any class, unit or group of individuals included in the program; any eligibility factors for the program; any time limits applicable to that program; job titles of all individuals eligible or selected for the program; ages of all individuals eligible or selected for the program; and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. *Id.* at § 626(f)(1)(H).

B. The ADEA's voluntary resolution process and expansive remedies encourage compliance by school district employers.

In enacting the ADEA, Congress prioritized the voluntary resolution of employment disputes over litigation of age discrimination claims. Indeed, like claims filed pursuant to Title VII, but unlike claims filed pursuant to 42 U.S.C. § 1983 (2013), the ADEA requires aggrieved individuals to file a charge

of discrimination with the EEOC as a mandatory condition precedent to filing suit. In turn, the ADEA directs the EEOC to "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . through informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626 (2013). An aggrieved individual is also required to give the EEOC at least sixty days' notice of an intent to file such an action. *Id.* at § 626(d). While no employer relishes receiving an EEOC charge, school districts need a constant and stable work force that is able to deliver education in a harmonious environment conducive to learning; therefore, districts have a strong incentive to resolve employment disputes as early as possible without litigation.

The relief available to aggrieved individuals is also expansive under the ADEA. The ADEA provides that an aggrieved individual may bring an action for whatever "legal or equitable relief as will effectuate the purposes of this Act." *Id.* at § 626(c)(1). In addition to injunctive relief, ADEA plaintiffs may secure: compelled employment (for applicants), reinstatement, front pay, lost benefits, promotion, and back pay. *Id.* at § 626(b). Where an employer is found to have engaged in conduct that it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA," a willful violation is established and liquidated damages are awarded, which are generally computed by doubling the amount awarded to the plaintiff. *Id.* at § 626(b); *see, e.g., Trans World Air Lines v. Thurston*, 469 U.S. 111, 126 (1985). Upon establishing a violation of the ADEA, a plaintiff is entitled to reasonable attorney's

fees and costs. 29 U.S.C. § 626(b) (2013). In addition, anyone who interferes with the EEOC's performance of its duties under the ADEA is subject to criminal penalties amounting to a fine, up to one year of prison, or both. *Id.* at § 629.

C. School district employees have additional protections under state anti-discrimination laws, collective bargaining agreements, civil service laws and school district established grievance procedures.

In the public school setting specifically, employees in many states have remedies under a collective bargaining agreement at their disposal. Many, if not most, of these agreements contain just cause provisions, prohibitions on discriminatory practices and retaliation, and mandates that ensure public school districts administer their personnel policies and practices in a fair and evenhanded manner. An employee grievance filed under such a collective bargaining agreement may ultimately terminate in binding arbitration that affords the employee significant relief when discrimination is found.

State civil service laws and local ordinances also protect many school district employees. Such laws typically establish a board to adjudicate claims of unfair treatment, failure to follow the established civil service code, and workplace discrimination. In addition, school districts commonly make internal grievance procedures available, allowing employees to make complaints of discrimination, which the

district will then investigate and attempt to resolve. This often serves as the first layer of protection against age discrimination. *See, e.g., Grievance Procedure of Raymore-Peculiar School District, available at* http://www.raypec.k12.mo.us/index.aspx?NID=813 (establishing grievance procedure for school district employees who contend they have been discriminated with respect to, *inter alia*, employment). These procedures provide employees an avenue to resolve complaints in a cost-effective and efficient manner, sometimes producing resolutions without the need for adversarial proceedings. Employees often have the right to appeal the decisions of school site administrators to the district superintendent and/or the board of education.

D. Notwithstanding the many protections afforded school district employees, the Seventh Circuit unnecessarily expanded the scope of 42 U.S.C. § 1983 to cover age discrimination.

It is against this backdrop of extensive protections against discrimination based on age in the employment context that the Seventh Circuit Court of Appeals declined to follow the overwhelming majority of its sister circuits and determined that a federal constitutional remedy, enforced against the employee's supervisors in their individual capacities through Section 1983, was necessary. Given the remedies available to plaintiffs

against governmental entities such as public school districts, the Seventh Circuit's decision is misplaced and misguided. An individual who believes he has been the victim of age discrimination does not need a redundant constitutional remedy to vindicate his rights.

The litany of remedies available to employees for age and other types of discrimination under federal law, state laws and collective bargaining agreements provide ample incentive for public school districts to adhere to non-discriminatory practices. Through proactive personnel practices and internal policies that work to eradicate workplace discrimination, school districts may investigate internal allegations of discrimination and remedy specific situations, so they do not burden federal courts with the role of "a super-personnel department that reexamines an entity's business decisions." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc).

This case provides the Court with the opportunity to reaffirm that public entity employers, including public school districts, should not be burdened with the specter of additional litigation when sufficient, effective remedies are already in place to remedy age discrimination. This is particularly important given the stakes that are involved in Section 1983 litigation, which often forces individual capacity public servants to defend themselves without adequate resources and jeopardizes their personal property.

III. EXISTING REMEDIES AVAILABLE TO EMPLOYEES ARE LESS COSTLY, LESS BURDENSOME, AND MORE ALIGNED WITH CONGRESSIONAL INTENT THAN EXPENSIVE, TIME-CONSUMING CONSTITUTIONAL LITIGATION

Because the ADEA, state equal employment opportunity statutes, collective bargaining agreements, civil service laws and school district-established grievance procedures provide comprehensive and more easily accessible remedies against schools that discriminate on the basis of age, a constitutional remedy via Section 1983 is redundant and unnecessary. These non-Section 1983 remedies also result in less costly, less complex, and less intrusive litigation. Because the litigation of constitutional claims against school districts under Section 1983 is more intricate and involved, both parties will incur greater legal costs. Protracted litigation in public schools not only redirects precious public funding away from the classroom, but also leads to the unnecessary expenditure of human capital, diminishes employee and supervisor morale, divides schools and school boards, and strains school board-union relationships.

A. The ADEA's comprehensive administrative scheme promotes the statute's purpose to eliminate unlawful discrimination quickly and precludes the need for a Section 1983 claim.

Congress mandated the deliberate involvement of the EEOC in ADEA disputes precisely to avoid wasteful and protracted litigation. Statutorily, the EEOC has specific responsibility to notify "prospective defendants" when a charge of discrimination is filed and "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d) (2013). "[W]hile the EEOC is not formally tasked with investigating ADEA claims, the EEOC must necessarily investigate in order to engage in conciliation, conference, and persuasion." *Shikles v. Sprint/United Management*, 426 F.3d 1304, 1311 (10th Cir. 2005) (citing *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 368 (1977) ("[T]he EEOC . . . is a federal administrative agency charged with . . . investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.").

By contrast, 42 U.S.C. § 1983 (2013) contains no such pre-suit mechanism for federal agency intervention and resolution of disputes before a lawsuit is filed. Allowing plaintiffs to use Section 1983 to bypass the express pre-suit mechanism created by Congress "to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion"

diametrically opposes Congressional intent; 29 U.S.C. § 626(d) (2013); and allows litigation to become the remedy of first resort when little is gained by doing so.

This case is different than the situation presented in *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255-56 (2009), where the Court was called upon to construe the provisions of another federal anti-discrimination statute—Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2013)—that has no administrative exhaustion requirement and no notice provisions. For this, and other reasons, the Court held that Title IX was not intended by Congress to be the sole mechanism for asserting claims for gender discrimination in schools. *Fitzgerald*, 555 U.S. at 258.

The *Fitzgerald* Court was not concerned about a litigant's ability to assert parallel and concurrent Section 1983 claims and thus circumvent procedures required by Congress because Title IX does not contain elaborate administrative procedures. *Id.*; *cf.*, *Millay v. Surry Sch. Dep't*, 707 F.Supp.2d 56, 59 (D. Maine 2010) (citing Magistrate Judge's Recommended Decision finding "[r]egarding the § 1983 claim, *Fitzgerald* is distinguishable since, unlike Title IX, the IDEA provides an 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement scheme.") (citation omitted). That is not the situation in this case. Accordingly, the applicable analysis is the one previously articulated by this Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984); and *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). These

decisions point to the administrative and remedial schemes of the respective statutes at issue to find that a plaintiff may not end run the remedies provided in these statutes in favor of a Section 1983 remedy. The administrative scheme put in place by Congress and the remedies available to age discrimination plaintiffs are "sufficiently comprehensive" to preclude use of Section 1983. *Sea Clammers*, 453 U.S. at 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983").

B. Constitutional claims under Section 1983 impose litigation burdens on both parties that prolong and complicate the resolution of age discrimination complaints without providing greater protection or more effective remedies.

The proof requirements in constitutional litigation against a school district are daunting. To prevail under the Equal Protection Clause, a plaintiff must establish invidious and purposeful discrimination by school officials. To hold the school district itself liable, the plaintiff must prove that the district maintained a custom, policy, or practice of discrimination to satisfy the strictures of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), which can be a difficult hurdle to clear. *See, e.g., Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511

F.3d 1114, 1124-25 (10th Cir. 2008) (holding that school district was not liable in Section 1983 action because requirements of *Monell* could not be satisfied); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (same). In order to meet this burden, plaintiffs must engage in extensive discovery. *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (noting the "costly, time-consuming, and intrusive" nature of discovery in Section 1983 litigation). In Section 1983 litigation, where the *Monell* doctrine applies, a plaintiff must seek discovery designed to uncover a district-wide custom, policy, or practice. *See Cadiz v. Kruger*, 2007 WL 4293976 at *3 (N.D. Ill. 2007) (acknowledging that a *Monell* claim involves "broad" discovery and that "the presence of a *Monell* claim will typically expand the scope and thus the cost of discovery"); *Vodak v. City of Chicago*, 2004 WL 1381043 at *5 (N.D. Ill. 2004) (noting that *Monell* claims "allow a broad inquiry into police practices and procedures, citizen complaints, similar incidents, and internal disciplinary actions 'extending well beyond the immediate circumstances surrounding plaintiffs' arrests.'"); (citing *Langford v. City of Elkhart*, 1992 WL 404443 (N.D. Ind. 1992)) (unpublished). Thus, a plaintiff must delve into prior incidents of age discrimination and, where multiple defendants are involved, must propound discovery to several different parties. Responding to such expansive discovery requests often requires school districts to expend enormous amounts of human and financial resources that are more appropriately spent on educating children.

When school officials are sued in their individual capacity under Section 1983, defendants are entitled to assert the defense of qualified immunity early in the litigation and, if denied, are entitled to file an interlocutory appeal while discovery is stayed. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (the defense of qualified immunity also extends to insulate public officials from the burden associated with engaging in discovery); *Anderson v. Crieghton*, 483 U.S. 635, 646 n.6 (1987) (one of the purposes of the qualified immunity standard is to protect public officials from discovery); *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985) (qualified immunity not only provides a defense to liability, but also gives a public official immunity from suit itself). Qualified immunity shields public officials from suit unless they personally participated in, or were deliberately indifferent to, a violation of an individual's clearly established constitutional rights. *See Williams v. Bd. of Regents*, 477 F.3d 1282, 1300 (11th Cir. 2007) (discussing general standards applicable to qualified immunity defense). While the qualified immunity defense offers school officials important protections, it remains the subject of considerable debate and litigation, and as a practical matter, is raised by counsel for individual capacity defendants in all but the most unique of cases, thus increasing the time and expense to both parties needed to resolve the discrimination claim.

Moreover, Section 1983 cases often involve multiple defendants—the school district and/or multiple school administrators—thus complicating

the litigation. The ADEA, by contrast, does not permit individual liability claims. *Fantini v. Salem State College*, 557 F.3d 22, 28-32 (1st Cir. 2009) (holding that individual liability does not exist under ADEA); *see also Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006); *Medina v. Ramsey Steel Co.*238 F.3d 674, 686 (5th Cir. 2001) (the ADEA "provides no basis for individual liability for supervisory employees") (citation omitted); *Horwitz v. Board of Educ. of Avoca Sch. Dist. No. 37*, 260 F.3d 602, 610 n.2 (7th Cir. 2001); ("Hill did not bring an ADEA claim against Mayor Marino himself, nor could he have because the ADEA does not provide for individual liability."); *Butler v. City of Prairie Village,* 172 F.3d 736, 744 (10th Cir.1999) (citing with approval cases from other circuits holding that there is no individual liability under the ADEA); *Martin v. Chemical Bank*, 129 F.3d 114 (2d Cir. 1997) (no individual liability under the ADEA); *Sabouri v. Ohio Dep't of Educ.*, 142 F.3d 436 (6th Cir. 1996) ("Sabouri may not seek relief from the individual defendants because neither Title VII nor the ADEA provides for individual liability."); *Smith v. Lomax*, 45 F.3d 402, 403 n. 4 (11th Cir.1995) (no individual liability under the ADEA); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994) (rejecting claim against individual capacity defendant); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (holding that individual liability under ADEA does not exist).

Because of the risk of multiple parties and rules governing conflicts of interest, it is often impossible for an attorney to represent both a governmental entity defendant and an individual

defendant in Section 1983 litigation. Thus, more lawyers typically appear in such cases, which invariably complicates litigation and results in higher legal costs for school districts and other public entities.

Finally, the statute of limitations in Section 1983 cases is often longer than the limitations period applicable in ADEA cases. Section 1983 borrows the most analogous statute of limitations period in each state. *Wilson v. Garcia*, 471 U.S. 261, 273-74 (1985). Thus, the limitations periods applicable to Section 1983 actions will vary state-by-state and claim-by-claim. By contrast, the ADEA provides a uniform limitations period which clearly defines when one must file a charge of discrimination: within 180 days in states with no anti-discrimination statute, and 300 days in states where such a law exists. The longer statute of limitations periods applicable to Section 1983 actions create uncertainty in public school districts, which are routinely faced with the need to move school administrators to different schools at the end of a school year and must reallocate teachers to different schools based upon the needs of the schools within the district.

CONCLUSION

For all of the above reasons, *Amici Curiae* urge this Court to reverse the Seventh Circuit's decision.

Respectfully submitted,

Francisco M. Negrón, Jr.*
General Counsel
Nat'l School Boards Assoc.
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
*Counsel of Record

Robert J. Sniffen
Sniffen & Spellman, P. A.
123 North Monroe Street
Tallahassee, FL 32301
(850) 205-1996

June 10, 2013